Supreme Court, U.S.
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No. 99-

IN THE
SUPREME COURT OF THE UNITED STATES

COASTAL FUELS OF PUERTO RICO, INC.,
Petitioner,

v.

CARIBBEAN PETROLEUM CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff that has proven both an antitrust violation and the fact of antitrust injury, each by a preponderance of the evidence, is entitled to a lesser standard of proof with respect to the amount of damages.

2. Whether a plaintiff that has proven that it was driven out of business by anticompetitive conduct may be presumptively foreclosed from recovering the profits it would have earned had it not been driven out of business.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

The caption identifies the only two parties to this matter.

Petitioner Coastal Fuels of Puerto Rico, Inc., is a subsidiary of Coastal Fuels Marketing, Inc., which is a subsidiary of Cosbel Petroleum Corporation, which is a subsidiary of The Coastal Corporation, the stock of which is publicly traded.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 175 F.3d 18 (1st Cir. 1999), and is reprinted in the appendix ("Pet. App.") at page 1a. The opinions of the court of appeals denying rehearing and rehearing in banc are unpublished, and are reproduced at Pet. App. 35a-44a. The unpublished opinion of the district court appears in the appendix at Pet. App. 45a.

JURISDICTION

The court of appeals entered judgment on April 14, 1999 (Pet. App. 33a), and denied petitioner's petition for rehearing and suggestion for rehearing in banc on May 21, 1999 (*id.* at 37a). A subsequent petition for recall of the mandate, for rehearing, and suggestion for rehearing in banc was denied on

July 7, 1999. *Id.* at 41a-44a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are the Puerto Rico Anti-Monopoly Act, Laws of Puerto Rico, tit. 10, § 263(a), and the Robinson-Patman Act Amendments to the Clayton Act, 15 U.S.C. § 13(a). These provisions are set forth in the Appendix at Pet. App. 61a-65a.

STATEMENT OF THE CASE

This antitrust case, in which petitioner has proved that it was driven out of business by respondent's price discrimination, raises two "important damage[s] issues" (Pet. App. 1a):

(1) the standard of proof for proving the amount of damages once the fact of injury has been established, and

(2) the viability of a legal presumption against the recovery of future lost profits by a plaintiff that has been driven out of business by anticompetitive conduct.

FACTUAL BACKGROUND

Petitioner Coastal Fuels of Puerto Rico, Inc. ("Coastal") purchased residual and diesel fuel oil from respondent, Caribbean Petroleum Corporation ("CAPECO"), a large crude oil refiner. Coastal then blended the residual and diesel fuel to make marine fuel oil, which it sold to cruise ships and other vessels in San Juan Harbor. CAPECO's refinery, located on San Juan Harbor, was the only reasonable source for the large volume of residual and diesel fuel needed by marine fuel

suppliers in San Juan Harbor. Pet. App. 3a. Thus Coastal, as well as the two incumbent competitors at the time Coastal entered the marine fuel supply business in San Juan, Caribbean Fuel Oil Trading, Inc. ("Caribbean") and Harbor Fuel Services, Inc. ("Harbor"), were dependent upon CAPECO for this crucial input. *Id.*

Coastal's parent, Coastal Fuels Marketing, Inc. ("CFMI"), had 84 years experience in the marine fuel oil business. CFMI closely studied demand and competitive conditions in San Juan Harbor. (A.994-99 & 1002-46) Based on this study and experience, in the fall of 1991 CFMI's vice president for marine sales produced a detailed business plan for Coastal The business plan analyzed the total volume of marine fuel sales in San Juan, Coastal's expected share of that volume (based in part on expected sales to CFMI's existing cruise-ship customers in other ports who also purchased marine fuel oil in San Juan), and Coastal's expected margins per barrel sold (which assumed a competitive price-cutting response from Harbor and Caribbean). *Id.* This conservative analysis showed that Coastal would earn a profit of approximately $200,000 in 1992. Pet. App. 11a.

Coastal entered into the San Juan bunker fuel market in October 1991. Business began well, with Coastal meeting its anticipated sales volumes in both November and December, 1991, and thus rapidly achieving market shares in those months of 24% and 27%, respectively. Pet. App. 9a, (A.857-58). Disaster swiftly followed.

Despite CAPECO's assurances to Coastal that CAPECO would provide Coastal with residual and diesel fuel on the same terms and conditions as it offered to Harbor and Caribbean, CAPECO in fact granted Harbor and Caribbean deep discounts that it did not offer Coastal. Pet. App. 4a. Harbor and

Caribbean began passing these discounts on to their customers. *Id.* This systematic price discrimination precluded Coastal from effectively competing with Harbor and Caribbean for marine fuel sales. *Id.*

In April 1992, Coastal's president met with CAPECO's chief operating officers, who confirmed the price discrimination and refused to stop it. (A.1123-24). Coastal then filed this suit, seeking preliminary injunctive relief and damages. Pet. App. 4a. The price discrimination continued until April 1993, when the First Circuit affirmed the district court's denial of preliminary injunctive relief against the ongoing price discrimination. Pet. App. 4a-5a. Coastal then went out of business "'because of the price discrimination.'" Pet. App. 25a. Between October 1991 and April 1993, Coastal lost almost $2 million. *Id.* at 5a.

PROCEDURAL BACKGROUND

1. *The first jury trial:* Coastal's complaint alleged that CAPECO had discriminated in price in violation of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a), and in violation of the Puerto Rico Anti-Monopoly Act, Laws of Puerto Rico, tit. 10, § 263(a); and that CAPECO had engaged in monopolization in violation of Section 2 of the Sherman Act and Section 260 of Title 10 of the Laws of Puerto Rico.[1]

Coastal, through the expert testimony of Robert Sherwin, sought more than $7 million in damages on these claims. Pet. App. 11a. During closing argument, CAPECO

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[1]Coastal also alleged injury from tortious business conduct in violation of Puerto Rico law, and from breach of contract. Coastal's award of $500,000 on the tort claim was affirmed by the court of appeals, and neither that award nor the unsuccessful contract claim is at issue here. Pet. App. 2a.

informed the jury that any damages awarded Coastal would be trebled (see Dkt. 420); the district court denied Coastal's motion for a mistrial on this ground, and the jury found in favor of Coastal on all counts except the claim for breach of contract. Coastal was awarded $1.5 million in antitrust damages, which were trebled in accordance with 15 U.S.C. § 13(a) and Laws of Puerto Rico, tit. 10, § 263, for a total antitrust award of $4.5 million. Pet. App. 2a. The district court entered judgment for Coastal, and CAPECO appealed. *Id.*

2. The First Circuit affirmed in part, reversed in part, and remanded. 79 F.3d 182 (1996), *cert. denied*, 519 U.S. 927 (1996). The court affirmed the finding of liability for price discrimination,[2] but reversed the monopolization verdict. Pet. App. 2a. Because the jury had awarded a single amount -- $1.5 million -- for antitrust damages flowing from both monopolization and price discrimination, the court of appeals remanded for further proceedings to determine the amount of damages attributable to price discrimination alone. *Id.*

3. *The second jury trial*: On remand, CAPECO urged that a new trial was necessary not only as to the amount of damages Coastal sustained as a result of CAPECO's illegal price discrimination, but also as to CAPECO's liability and Coastal's injury in fact. Pet. App. 8a. Coastal maintained that the $1.5 million verdict could be sustained on the prior record under Rule 49(a). *Id.* The district court granted CAPECO's request

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[2]The court affirmed the finding of price discrimination under the Puerto Rico Anti-Monopoly Act of 1964, but reversed under the Robinson-Patman Act, because the discriminatory sales did not cross a state line and therefore did not satisfy the federal "in commerce" requirement. In all other respects, however, Puerto Rico's Anti-Monopoly Act has been construed as equivalent to the Robinson-Patman Act for purposes of price discrimination, and hence the court of appeals has "analyz[ed] the case under the Robinson-Patman Act." Pet. App. 3a.

for a new trial, but held that the sole issue to be considered on remand is the amount of price discrimination damages to be awarded to Coastal. *Id.*

At the second trial, Sherwin testified that Coastal had suffered damages of nearly $8 million from price discrimination alone. Pet. App. 10a-11a. As in the first trial, his damages calculation had two principal components: (1) Coastal's lost profits from 1991-96, which included lost profits from 1991 to the time Coastal went out of business in 1993, as well as Coastal's lost "future" profits from 1993 through 1996; and (2) Coastal's going-concern value as of the end of 1996. *Id.* at 9a-11a.

To determine the amount of Coastal's lost profits, Sherwin compared Coastal's actual cash flows with the cash flows that Coastal would have realized in 1991-96 "but for" CAPECO's illegal price discrimination. Pet. App. 9a-12a. Sherwin's "but for" calculation relied upon projections of Coastal's market share, Coastal's gross margin, and Coastal's operating expenses. *Id.* at 11a, (A.429-38; A.1288-1320). Sherwin explained in detail the bases for these projections (A.455-525) and for his conclusion that the effect of price discrimination alone was sufficiently devastating to drive Coastal out of business in April, 1993. (A.416, 421, 424, 438-40); see Pet. App. 25a.

Sherwin's projections took account of real world events that occurred between 1991 and 1996 that would have affected Coastal's profitability in the absence of price discrimination. Pet. App. 11a. He accounted for the negative impact of the Puerto Rico excise tax on marine fuel sales, which was introduced in July 1992 (after Coastal's entry) and repealed in December 1993 (after Coastal's exit). *Id.* He accounted for other post-April 1993 events as well, including those that would

have increased Coastal's profits (such as Caribbean's exit from the market in the fall of 1993), as well as those that would have decreased Coastal's profits (such as CAPECO's temporary shutdown of its refinery in 1995). (A.417-40). Finally, Sherwin adjusted his calculations to exclude damages from anticompetitive conduct other than price discrimination which was redressable only under theories of monopolization or tort law. Pet. App. 24a-27a & n.9. His calculations resulted in a lost profits estimate of $3,475,000 from 1991-96. *Id.* at 10a.

Sherwin then calculated Coastal's going-concern value absent CAPECO's price discrimination as of the end of 1996. *Id.* at 11a. A firm's going-concern value is the price a "willing buyer" would pay for the firm at a given time; it thus reflects a third party's estimate of the firm's future profitability. *Id.* at 12a. Both parties' economic experts testified that going-concern value must be calculated at a time of market stability. Pet. App. 17a & n.6. Sherwin chose the year 1996 as a time sufficiently removed from such destabilizing events as the excise tax and CAPECO's price discrimination to conclude that the market had stabilized. *Id.* at 11a. Sherwin calculated Coastal's going-concern value by multiplying an appropriately derived "going-concern multiple" times the firm's earnings in an appropriate year, and then discounting the amount to present value. (A.1326-27). Sherwin determined that Coastal's going-concern value as of the end of 1996 would have been $4,490,000. Pet. App. 10a-11a.

Sherwin's damages testimony was endorsed by that of Professor Bradford Cornell, an expert in corporate valuation and the author of a leading work in that field. Pet. App. 9a-10a. Dr. Cornell testified that Sherwin's use of a "but for" market-forecast methodology to calculate lost profits from 1991-1996 was "very standard and conceptually correct." (A.1201). He confirmed the validity of Sherwin's method of calculating going-

concern value and the reasonableness of the multiple, and explained that it is "not only reasonable" but "necessary" to apply a multiple only "when a business is up and operating at an equilibrium state, business as usual." (A.1206).

The jury was instructed that "'in computing future profits, the law provides that the plaintiff may recover his lost profits from the date it cease[s] doing business . . . until a date at or near trial, and in addition its going-concern value as of that day.'" Pet. App. 13a. With regard to the burden of proof, the jury was instructed that "Coastal must prove the amount of its damages." *Id.* at 58a. With respect to the standard of proof, the jury was instructed in pertinent part as follows:

> At the beginning of the case I mentioned to you preponderance of the evidence. You must put that out of your mind, because in a price discrimination case such as this one, a lesser standard is applied because the most elementary conceptions of justice require that the wrongdoer shall bear the risk of the uncertainty which his own conduct has created. . . . So Coastal must produce evidence from which you, the jury, can make a just and reasonable inference as to the amount of damages. . . . You may not, however, calculate damages based solely on speculation or guesswork.[3]

The district court barred CAPECO in the second trial from telling the jury at any point that the damages would be

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[3]The entire instruction on the standard of proof is set out at Pet. App. 59a. The reference at the outset of the instruction to the "beginning of the case" is to a pretrial instruction that CAPECO requested and that the District Court gave, that erroneously instructed the jury that liability was still an issue in the case and was to be resolved under the preponderance-of-the-evidence standard. (A.938, 943-44).

trebled. The second jury returned a verdict for Coastal in the amount of $4.5 million, which was then trebled for a total antitrust judgment of $13.5 million. Pet. App. 2a.

The district court denied CAPECO's motions for judgment as a matter of law and for a new trial or remittitur of damages. CAPECO again appealed. Pet. App. 2a.

4. On appeal, the First Circuit reversed and remanded the case for yet a third jury trial on damages. Pet. App. 3a. The court found that the district court had erroneously instructed the jury in two respects.

First, the court held that it was error for the district court to instruct the jury that "'the law provides that the plaintiff may recover his lost profits from the date it cease[d] doing business [in 1993] until a date at or near trial, and, in addition, its going-concern value as of that day.'" Pet. App. 13a (alterations in original); see *id.* at 12a-23a. In so holding, the court relied on a prior First Circuit decision, *Farmington Dowel Products Co.* v. *Forster Manufacturing Co.*, 421 F.2d 61 (1st Cir. 1970), where the court had "required that plaintiff's damages be calculated as of the date plaintiff went out of business, as opposed to a date close to trial, some ten years later." Pet. App. 16a. The panel held that *Farmington Dowel* establishes a "framework" (*id.* at 18a) or "rule" (*id.* at 21a) that "going-concern value should be evaluated as of the time plaintiff goes out of business and actual lost profits awarded only up until that date." *Id.* at 18a. Under this rule, the "burden is on the plaintiff to show circumstances which warrant choice of some date other than the date the company went out of business and that the evidence . . . is not speculative." *Id.* at 19a. Reviewing the evidence under this new rule, the court concluded that Coastal had not met this "burden." *Id.* at 18a-23a. It therefore reversed and remanded for a third damages

trial in which "Coastal is confined to its actual lost profits as of the date it went out of business in 1993, plus its going-concern value calculated as of that date but for CAPECO's price discrimination." *Id.* at 23a.

Second, the court identified "another type of error in the jury instructions" having "to do with the burden of proof." Pet. App. 27a. The court held that it was error for the court "to expressly instruct the jury to disregard the preponderance-of-the-evidence standard and to apply a lesser standard." *Id.* at 28a. The court recognized that the district court had attempted to follow this Court's precedent in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), but attributed the district court's error to "[t]he confusion in this area [that] starts with the language of the 1931 Supreme Court decision in *Story Parchment*." Pet. App. 28a. In the court of appeals' view, *Story* stands only for the proposition that plaintiffs are allowed "some flexibility in proving the amount of damages relating to hypothetical events"; *Story* does not relieve plaintiffs from having "to show *probability* that the damages caused by the wrongdoer's misconduct fall within a reasonably estimated range of damages." *Id.* at 30a.

The court then expressly rejected several of CAPECO's other arguments, including its claim that the fact-of-injury issue also had to be retried (Pet. App. 31a-32a), and ordered yet another new retrial on damages only. *Id.* On May 21, 1999, the court denied Coastal's petition for rehearing (*id.* at 35a) and a majority of the judges in active service declined to order rehearing in banc.[4] *Id.* at 37a.

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[4]Coastal subsequently petitioned for recall of the mandate and again for rehearing and rehearing in banc, because the mandate, unlike the judgment, contained new language reassigning this case to a new judge, thereby granting

(continued...)

REASONS FOR GRANTING THE PETITION

The panel correctly observed at the outset of its opinion that "this antitrust price-discrimination case raises . . . important damage issues." Pet. App. 1a. Indeed, at the heart of both issues on which the court of appeals reversed the judgment below is the fundamental question of whether the defendant bears the risk of uncertainty as to the amount of damages once the plaintiff proves, by a preponderance of the evidence, liability and the fact of antitrust injury. We believe this Court's precedents answer this question in the affirmative. The court of appeals, however, found "confusion" in the Court's precedent (*id.* at 28a), and proceeded to adopt two new rules of damages that conflict with that precedent and with decisions of the courts of appeals.

First, the court of appeals held that it was error for the district court to instruct the jury that plaintiff need not prove the amount of damages by a preponderance of the evidence. That holding conflicts with the decisions of this Court in *Story Parchment* and in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), as well as with holdings of both the Fifth and Eighth Circuits, that a lesser standard of proof than a preponderance of the evidence applies to the amount of damages once the fact of injury is proven.

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[4](...continued)
CAPECO relief in the mandate that CAPECO had expressly sought in its brief, but that had been denied in the panel opinion and judgment. *Compare* Pet. App. 39a (Mandate) *with id.* at 33a (Judgment) *and id.* at 32a (Opinion) ("we need not reach the myriad of other claims CAPECO has raised"). Without explanation of the non-conforming mandate, Coastal's subsequent petitions were denied on July 7, 1999. *Id.* at 41a-44a.

Second, the court of appeals established a new rule that places the burden on the plaintiff to overcome a legal presumption that damages for the loss of plaintiff's business due to anticompetitive conduct are limited to the going-concern value of that business at the time of its demise. This new rule improperly shifts the risk of uncertainty in calculating the amount of damages from defendant to plaintiff in contravention of *Story Parchment*. The rule also conflicts with this Court's holding in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933), that damages for the wrongful loss of property may not be limited to an hypothesized sale of the property at the time of loss. Finally, the holding conflicts with the decisions of several circuit courts of appeals -- one of which provided the language of the district court's instruction.

I.

"The most elementary conceptions of justice and public policy require that the *wrongdoer shall bear the risk* of the uncertainty which his own wrong has created." *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 265 (1946) (emphasis added). It is this bedrock principle that supports this Court's decisions in *Story Parchment*, *Bigelow*, and numerous other cases, and which the First Circuit's two new damages rules squarely violate.

1. In *Story Parchment*, as in this case, "there was uncertainty as to the extent of the damage, but there was none as to the fact of damage." 282 U.S. at 562. The uncertainty as to the extent of damage had led the First Circuit in *Story* to conclude that no damages could be awarded. This Court reversed, holding that "there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount." *Id.* Accordingly, "while

the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." *Id.* at 563.

Although the Court in *Story Parchment* did not say, in so many words, that a plaintiff, having proved the fact of injury by a preponderance of the evidence, need not prove the amount of injury by a preponderance of the evidence, that is the plain import of its decision. The Court emphasized that once the plaintiff proves the fact of injury, "the risk of uncertainty should be thrown upon the wrongdoer instead of upon the injured party." *Id.* (quoting numerous cases to the same effect). The very "function of a standard of proof . . . is to *allocate the risk of error* between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington* v. *Texas*, 441 U.S. 418, 423 (1979) (emphasis added) (citation omitted). Because the preponderance standard places the risk of uncertainty in proving the fact of injury on the plaintiff, the only way to have that risk "thrown upon the wrongdoer" once injury is shown, is to relieve the plaintiff of having to prove the amount of damages by that same preponderance standard.

The Court's decision in *Bigelow* confirms that *Story Parchment* relieves an antitrust plaintiff from having to prove the amount of damages by a preponderance of the evidence. In *Bigelow*, which involved an antitrust conspiracy to reduce competition among movie theaters, "[t]he sole question for decision" was "whether the evidence of damage [was] sufficient to support the verdict." 327 U.S. at 254. The Seventh Circuit had reversed because, in its view, "[t]he jury must base their verdict upon a preponderance of all the competent evidence," a standard that the court of appeals found plaintiffs had failed to satisfy. *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F.2d 877, 883 (7th Cir. 1945). This Court rejected the Seventh Circuit's

approach. Relying on *Story Parchment*, the Court held that it is "a well settled principle" that the jury can reach its conclusions "as a matter of just and reasonable inference," and reinstated the jury's award. *Bigelow*, 327 U.S. at 264.

Under *Story Parchment* and *Bigelow*, then, the preponderance standard applicable to the fact of injury is not applicable to the amount of injury. The damages principles expressed in *Story* and *Bigelow*, moreover, are an integral part of this Court's damages jurisprudence. See, *e.g.*, *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543, 573 (1990); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927).[5] The jury instruction given below -- which stated that the preponderance standard was inapplicable and that damages must be proved by a just and reasonable inference -- conformed precisely to this Court's precedent.

2. In holding that plaintiffs must prove not only the fact but also the amount of damage by a preponderance of the evidence, the First Circuit placed itself in conflict with decisions of both the Fifth and Eighth Circuits. In *Pierce* v. *Ramsey Winch Co.*, 753 F.2d 416 (5th Cir. 1985), the Fifth Circuit set forth the implications of *Story Parchment* for the standard of proof of the amount of damages. The Fifth Circuit began by observing that "an antitrust plaintiff must prove by a preponderance of the evidence some 'element of actual damage caused by the defendant's violation of the antitrust laws.'" *Id.* at 435. The court then explained that "[o]nce the fact of

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[5] *See also J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 570 (1981) (Powell, J., dissenting in part) (although the "plaintiff has the burden of proving the fact of antitrust injury by a preponderance of the evidence," once injury has been proven, "a court [may] properly be lenient in the evidence it requires to prove the amount of damages.").

damage has been established, plaintiff enjoys a relaxed burden with respect to the amount of damages." *Id.* In particular, the court noted, "[u]nder this relaxed burden, a jury verdict may stand on less evidence than is normally required to support a damage award in civil cases. While rank speculation will not be tolerated, '[e]vidence sufficient to support a "just and reasonable inference of damages suffices."'" *Id.* (citation omitted) (second alteration in original).

The conflict with the Eighth Circuit is equally plain. In *National Farmers' Org., Inc.* v. *Associated Milk Producers, Inc.*, 850 F.2d 1286, 1292-93 (8th Cir. 1988), the court of appeals stressed that although antitrust liability issues, including the fact of injury, "must be established by a preponderance of the evidence, a *lesser standard of proof* is applicable to proof of the *amount* of damage." (first emphasis added) (citing, *inter alia*, *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931)). The Eighth Circuit therefore held that, "in proving the *amount* of damage, the antitrust plaintiff need only present evidence from which the fact finder may make a just and reasonable estimate of the damage that is not based on speculation or guesswork." *Id.* at 1293.

The jury instruction held to be erroneous here is virtually a verbatim recitation of the holdings in *Pierce* and *National Farmers'* that the preponderance standard is inapplicable once the fact of injury is proven, plus a verbatim recitation of the proper "just and reasonable inference" standard and reasons therefore as set forth in those cases and in *Story Parchment*. Compare Pet. App. 59a (jury instruction) with *Story Parchment*, 282 U.S. at 562-63, and *Pierce*, 753 F.2d at 435, and *National Farmers'*, 850 F.2d at 1292-93. There can be no question, therefore, that if this case had been tried to a jury in either the Fifth or Eighth Circuits, the instruction would not have been held erroneous; indeed, the *failure* to give that

instruction might well have been error. The standard of proof for the amount of antitrust damages is a question of fundamental national importance. The First Circuit's unequivocal and erroneous departure from the clear import of this Court's prior decisions and from the decisions of other circuits therefore warrants plenary review by this Court.

II.

The First Circuit's decision to establish a new legal presumption against the recovery of lost future profits similarly "ignores controlling principles of the law of damages." *Bigelow*, 327 U.S. at 261. The panel transformed one of its prior decisions, *Farmington Dowel*, that had been viewed as an outlier distinguishable on its facts,[6] into an unprecedented and erroneous "rule" (Pet. App. 21a) of damages law. In the First Circuit, a plaintiff that has been driven out of business by anticompetitive conduct is now presumptively foreclosed from recovering the profits it would have earned had it stayed in business. Unless it can overcome the presumption, that plaintiff is limited to recovery of its going-concern value, that is, "what a willing buyer would have paid" for the business, at the time of its demise. *Id.* at 23a. This holding runs counter to this Court's precedents, to other circuit decisions, and to common sense.

1. Until the panel's decision, it was "established beyond peradventure that going concern value and lost future

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[6] *Compare Fishman* v. *Estate of Wirtz*, 807 F.2d 520, 551-52 (7th Cir. 1986) (distinguishing *Farmington* as based on the lack of admissible evidence of damages), *with Farmington Dowel Prods. Co.* v. *Forster Mfg. Co.*, 421 F.2d 61, 81-82, 84-85 (1st Cir. 1970) ("Any inadequacy which may have resulted should be attributed to Farmington's own presentation of its case.").

profits are valid alternative measures of antitrust damages."[7] A plaintiff was therefore free to choose between seeking lost future profits (which was advantageous if events subsequent to the loss of the business would have improved plaintiff's profitability, or if the plaintiff's unique attributes made the business more valuable to it than to third parties) or seeking going-concern value at the time of the loss of business (if subsequent events would have diminished plaintiff's profitability).

Of course, permitting the plaintiff to choose between these damages theories is disadvantageous to the defendant. But it is the sort of disadvantage that this Court has repeatedly confirmed to be not only appropriate but necessary to vindicate basic principles of justice once the fact of antitrust injury is established. The point of "throw[ing]" the "risk of the uncertainty" onto the "wrongdoer," *Story Parchment*, 282 U.S. at 563, is to ensure that damages rules do not "enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *Bigelow*, 327 U.S. at 264. By restricting the plaintiff to going-concern value unless the *plaintiff* can make a showing of certainty of future profits that overcomes the First Circuit's legal presumption, the First Circuit has thrown the risk of uncertainty right back on the plaintiff -- precisely where it should not be.

Indeed, this Court squarely and unanimously rejected a litigant's attempt to establish a comparable rule against lost future profits in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933) (Cardozo, J.). The issue in

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[7] *Graphic Prods. Distribs., Inc.* v *ITEK, Corp.*, 717 F.2d 1560, 1579 (11th Cir. 1983); *see, e.g., Lehrman* v. *Gulf Oil Corp.*, 500 F.2d 659, 663-64 (5th Cir. 1974) (same); H. Hovenkamp, *Federal Antitrust Policy* 624 (1994) (same).

Sinclair was how to calculate damages for the loss of the right to market a patent that -- in light of subsequent events -- turned out to be quite valuable. The defendant, like the respondent and the First Circuit here, argued that the court should blind itself to the subsequent events, and restrict plaintiff to "the value of the patent at the time of the breach." *Id.* at 697.

The Court rejected that argument. In a ruling equally applicable to the loss of a new business, the Court held that the plaintiff is entitled to "the value that would have been uncovered if he had kept it as his own." *Id.* at 699. That value "will not be known by first imagining a forced sale, and then accepting as a measure its probable results. The law is not so tender to sellers in default." *Id.*[8]

Notably, the Court in *Sinclair* effectively rejected not only a rule like the one adopted below but its rationale. In the panel's view, the reason for precluding the plaintiff from seeking recovery of lost future profits is that the estimation of such profits is presumptively "excessively speculative." Pet. App. 17a. But the passage of time, which the panel saw as a vice, was correctly recognized by this Court as a virtue:

> [A] different situation is presented if years have gone by before the evidence is offered. Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts *may not* neglect. We find *no rule of law* that sets a clasp upon its pages, and forbids us to look within.

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[8]This Court has repeatedly affirmed awards of lost future profits. *See Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 376-79 (1927) (affirming lost profits award for four years exclusion from sub-market); *Palmer* v. *Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 559-562 (1941) (approving lost profits award for eight years following injury).

Sinclair, 289 U.S. at 698 (emphasis added). Here, by contrast, the court of appeals has chosen to establish just such an unprecedented rule, and now presumptively requires courts and juries to neglect the wisdom of experience in favor "imagining a forced sale." *Id.* at 699.

2. Consistent with this Court's clear direction, the courts of appeals have routinely rejected litigants' attempts to confine the victims of anticompetitive conduct to damages calculated by "imagining a forced sale" at the time of the loss of a business rather than to lost future profits. In *Lehrman* v. *Gulf Oil Corp.*, 500 F.2d 659 (5th Cir. 1974), the Fifth Circuit affirmed the jury's lost profits award for 10 years after the plaintiff was driven out of business, and rejected the defendant's plea that "going concern value should be the only measure of damages, not future profits." *Id.* at 663; see *id.* at 663-64. The court reasoned that it would "more fully compensate a businessman by measuring *his* lost earnings, not just what it is worth to *someone else* to reach for those earnings." *Id.* at 664 (emphasis added).

Even more starkly opposed is the Fourth Circuit's decision in *Southern Pines Chrysler-Plymouth, Inc.* v. *Chrysler Corp.*, 826 F.2d 1360, 1363-64 (4th Cir. 1987) which the panel cited as a contrary reference but did not distinguish. See Pet. App. 17a. In *Southern Pines*, a plaintiff car dealership was driven out of business by the manufacturer's unlawful sales practices. The Fourth Circuit affirmed the jury's award of damages for projected lost profits from the time the plaintiff went out of business until a date "immediately preceding" trial, and also affirmed an award of the business's projected going-concern value "as of that date." *Southern Pines*, 826 F.2d at 1362, 1364. The fact that the business had failed several years prior to the going-concern value date was held not to bar this recovery. As the Fourth Circuit explained, "[s]everal federal

courts have reasoned [based on *Story Parchment* and its progeny] . . . that the plaintiff may recover his lost profits from the date he ceases doing business until a date at or near trial, and in addition his 'going-concern value' as of that date." 862 F.2d at 1364.[9] The district court's jury instruction -- held to be erroneous by the First Circuit -- is, once again, nearly a verbatim recitation of the rule set forth in *Southern Pines*. Compare *id.*, with page 8, *supra*.[10]

3. Finally, the First Circuit's decision merits review not only because the new legal presumption conflicts with *Story Parchment*, *Sinclair*, and the decisions of several circuit courts of appeals, but because the rule is arbitrary.

Here, for example, the panel has concluded that Coastal must, as a matter of law: (1) use a method of calculating

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[9]*See, e.g. Arnott* v. *American Oil Co.*, 609 F.2d 873, 886 (8th Cir. 1979) (rejecting argument "that the proper measure of damages is the going concern value of a destroyed business," and affirming jury's award based on "loss of future profits"); *Fishman* v. *Estate of Wirtz*, 594 F. Supp. 853, 888 & n.23 (N.D. Ill. 1984) (citing *Sinclair*, rejecting argument that going-concern value is sole legitimate measure, and awarding lost future profits), *aff'd in relevant part*, 807 F.2d 520, 552 (7th Cir. 1986); *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 23 n.12 (5th Cir.1974) (rejecting argument that "the proper measure of damages should have been the 'going concern' value of Terrell's business at the time of . . . destruction"); *cf.* R. Dunn, *Recovery of Damages for Lost Profits* 341-80 (5th ed. 1998).

[10]The court of appeals also erred in criticizing this same instruction (and implicitly the Fourth Circuit's holding in *Southern Pines*) as improper because it "could effectively be understood to tell the jury" to "assume" that "Coastal would have remained in business until 1998." Pet. App. 15a. Such an understanding -- which never occurred to CAPECO -- would have been dispelled by the very next sentence of the instructions: "The fact that I have instructed you on the proper measure of damages should not be considered as an indication of any view of mine as to whether you should grant any damages or not." *Id.* at 60a.

damages that all three economic experts, including respondent's expert, testified should be used only at a time of market stability; and (2) apply it at a time (April 1993) at which both parties' experts said the market was not stable. In short, the court of appeals is requiring Coastal to imagine the terms of a forced sale to an unknown third party at a time of market disequilibrium. This is hardly a recipe for avoiding speculation. "The law will make the best appraisal that it can, summoning to its service whatever aids it can command." *Sinclair*, 289 U.S. at 697. Where the experience of subsequent events is available, there is no reason to forbid a plaintiff from taking that experience into account in calculating damages.

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The First Circuit's constriction of the remedies available to antitrust plaintiffs that have proven that defendants have caused them to lose their business cannot be reconciled with the fundamental equitable principles that have guided this Court's jurisprudence for most of this century. The First Circuit's stark refusal to accord antitrust plaintiffs that have proven the fact of injury a lesser standard of proof of the amount of damages is also at war with the prior holdings of this Court and of other circuits. The First Circuit's decision in this important area of law therefore merits plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 18, 1999

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COASTAL FUELS OF PUERTO RICO, INC.,
Plaintiff, Appellee,

v.

CARIBBEAN PETROLEUM CORPORATION,
Defendant, Appellant.

No. 98-1652

United States Court of Appeals, First Circuit.

Argued November 3, 1998

Decided April 14, 1999

Before LYNCH, Circuit Judge, HALL, Senior Circuit Judge,* and LIPEZ, Circuit Judge.

LYNCH, Circuit Judge.

In its third visit to this court, this antitrust price-discrimination case raises a number of important damage issues.

*of the ninth circuit, sitting by designation

After the first trial in this case, this court upheld a finding of antitrust liability against Caribbean Petroleum Corporation ("CAPECO") on a Puerto Rican law price-discrimination theory and a tort verdict of $500,000, but reversed a finding of monopolization in violation of the Sherman Act. We vacated the jury verdict of $1.5 million in single antitrust damages (tripled, to $4.5 million) and remanded for further proceedings. We did so because the antitrust verdict may have included damages for the monopolization claim, on which we had reversed. Thus, there was a reasonable possibility the jury had awarded plaintiff too much. Because we were remanding for a new trial on damages, we did not reach a number of CAPECO's specific challenges to damages evidence presented by plaintiff Coastal Fuels of Puerto Rico ("Coastal"). *See Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 186, 200-01 (1st Cir.), *cert. denied*, 519 U.S. 927, 117 S.Ct. 294, 136 L.Ed.2d 214 (1996).

This appeal stems from those further proceedings. Eventually, the entire price-discrimination damages case was retried and the second jury returned a verdict on the price-discrimination claim which was three times larger ($4.5 million before trebling) than the initial verdict. Of this $4.5 million, $2 million was for going-concern damages. The district court denied CAPECO's motions for a judgment as a matter of law, for a new trial, or for remittitur of damages. *See Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, Civ. No. 92-1584, slip op. at 1 (D.P.R. Apr. 23, 1998) ("April 23, 1998 slip op.")

CAPECO, the party for whose benefit the remand supposedly operated, appeals from the damages retrial and verdict, raising a myriad of issues. Treating Puerto Rican price discrimination law as largely equivalent to federal price discrimination law, *see Coastal Fuels*, 79 F.3d at 190, as the

parties have agreed, and thus analyzing the case under the Robinson-Patman Act, we reverse and remand. We also confront and reject a number of CAPECO's other claims, both to guide further proceedings in this case and to emphasize our rejection of CAPECO's claim that judgment should enter in its favor.

I

We set forth the basic facts which frame the dispute; fuller details may be found in our earlier opinions.[1] CAPECO operated a refinery in San Juan, Puerto Rico. The refinery's products included fuel appropriate for marine engines. Resellers purchased such fuel, sometimes called bunker fuel, and sold it to cruise ships and other ocean-going vessels. CAPECO's refinery was the only one nearby; CAPECO was the only local source of bunker fuel. While a reseller could import fuel from another port, prohibitive transportation costs made the practice uneconomical. CAPECO was, in effect, San Juan's only supplier of bunker fuel. CAPECO sold primarily to its two major long-standing customers, Harbor Fuel Services, Inc. ("Harbor") and Caribbean Fuel Oil Trading, Inc. ("Caribbean"). While Coastal's parent company, Coastal Fuels Marketing, Inc. ("CFMI"), had operations elsewhere, Coastal was a new entrant to the bunker-fuel market in San Juan. Coastal began doing business in Puerto Rico in October 1991. It looked to CAPECO to supply the needed fuel.

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[1] In 1993, before the first trial, we affirmed the district court's denial of a preliminary injunction requiring CAPECO to end its price discrimination against Coastal. *See Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 990 F.2d 25 (1st Cir.1993).

In September 1991, CAPECO agreed to sell to Coastal for six months according to a price formula. However, CAPECO sold to two long-standing customers, Harbor and Caribbean, at a discount from the price charged Coastal, the new entrant. Harbor and Caribbean in turn passed on most of this price advantage to their customers. In this court's opinion following the first trial we found that "CAPECO's own expert witness quantified the total price discrimination in favor of Caribbean and Harbor as $682,451.78 for the period from October 1991 to April 1992." *Coastal Fuels*, 79 F.3rd at 187. Coastal was not profitable during this period.

At the time of Coastal's entry into the San Juan market, Harbor had 54% of the market, Caribbean had 40%, and Esso had 6%. Coastal's 1991 business plan projected it would gain a significant foothold in the San Juan market within the first year of operation. Coastal estimated that it would be able to sell 100,000 barrels of fuel per month, or more than a million barrels a year. The total size of the San Juan market, Coastal estimated, was between 2.5 and 4.0 million barrels per year. During the first five months of Coastal's operation, the actual average price advantage given by CAPECO to Coastal's competitors was $.48 per barrel in favor of Harbor and $.37 per barrel in favor of Caribbean. During Coastal's remaining thirteen months of operation, the price differential varied, averaging about a $.07 per barrel disadvantage to Coastal. The cost of marine fuel oil sold by CAPECO during this eighteen month period varied from $8 to $13 per barrel.

In May 1992 Coastal filed this action and sought to enjoin CAPECO from future price discrimination. The district court denied the injunction, and this court affirmed. *See Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 990 F.2d 25 (1st Cir.1993). After Coastal filed suit, CAPECO made a take-it-or-leave-it price offer to Coastal, which Coastal took.

Coastal still paid more for CAPECO's product than did Coastal's competitors. CAPECO cut off supply to Coastal completely on March 31, 1993, and Coastal went out of business shortly thereafter. Coastal never became a profitable business; it lost almost $2 million during its eighteen months in operation.

In July 1992, Puerto Rico imposed an excise tax of $.84 per barrel on the resale of bunker fuel in Puerto Rico. The tax hurt the total sales of bunker fuel in San Juan Harbor. The ultimate market voted with its fleet, as cruise boats chose to fill up at other ports not subject to the tax. The tax was repealed in December 1993, eight months after Coastal had gone out of business. The excise tax reduced sales volumes in Puerto Rico by roughly 37%, from about 3.8 million barrels in 1992 to about 2.4 million barrels in 1993. After the repeal of the excise tax in December 1993, the San Juan sales volume started to climb back up, reaching 3.1 million barrels in 1994. After Coastal went out of business, one of Coastal's competitors, Caribbean, also left the market, in the fall of 1993. The other major reseller, Harbor, thus enjoyed a greater share of the market, although it faced new competition over time.

CAPECO itself closed down its refinery in April 1995. In 1996, total San Juan Harbor sales volume was less than 2 million barrels. When CAPECO closed its refinery, Coastal had already been out of business for more than two years. At the time CAPECO closed, it stated that its closing was temporary. But it has apparently not reopened its refinery. As a result, bunker fuel resellers in San Juan Harbor must import fuel from elsewhere.

II

Our 1996 decision upheld a finding of liability on a price-discrimination claim based on Puerto Rican law against defendant CAPECO, reversed the claim under the federal Clayton Act, as amended by the Robinson-Patman Act, because no discriminatory transaction crossed a state line, and reversed a Sherman Act monopolization claim. The jury had awarded $1.5 million in single antitrust damages (combining both the monopolization and price-discrimination theories) and $500,000 for the tort claim. The $1.5 million was trebled and the $500,000 added. The tort verdict is no longer in dispute. This court vacated the antitrust damages verdict, saying the $1.5 million was most likely excessive because it may well have included damages stemming from harms associated with monopolization but not with price discrimination.

We found that CAPECO had waived any argument that this was a "primary line" price-discrimination case[2] and we analyzed it as a case of "secondary line" discrimination: "Thus, the theory of injury is that CAPECO sold bunker fuel to Coastal at an unfavorable price relative to Harbor and Caribbean, and consequently, competition between Coastal, Harbor and Caribbean was thereby injured." *Coastal Fuels*, 79 F.3d at 189. In secondary line cases, plaintiffs usually allege that discriminatory pricing (here, by CAPECO) gave favored purchasers (here, Harbor and Caribbean) an advantage that

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[2] The primary line theory was based on the fact that Coastal is a subsidiary of CFMI, a company that provides marine fuel to ships. CFMI's usual supplier of bunker fuel was its sister corporation, Coastal States Trading, Inc. ("CSTI"). CSTI is a competitor of CAPECO in other markets. Because, on this theory, the discrimination adversely impacted competition with CAPECO's competitors, the case could be a primary line case. The *Morton Salt* presumption, discussed below, does not apply to primary line cases.

caused injury through loss of business. Typically, Robinson-Patman plaintiffs show lost sales or lost profits or both.

Once substantial price discrimination was shown, under the *Morton Salt* rule, *see FTC v. Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948), we held there was a prima facie case of injury to competition, *see Coastal Fuels*, 79 F.3d at 191-93. Recognizing that the Robinson-Patman Act, unlike the Sherman Act, was meant less to protect consumer welfare than to protect small merchants, this court rejected CAPECO's arguments that changes in the law on primary line price discrimination, more akin to the Sherman Act, meant that the *Morton Salt* rule could no longer be applied to secondary-line Robinson-Patman cases. *See id.* at 191-93.

Because the jury necessarily concluded that CAPECO's evidence was insufficient to overcome the prima facie case plus other evidence offered by Coastal, this court examined whether CAPECO's evidence was so strong as to compel the conclusion that there was no causal connection between the price differential and Coastal's lost sales and profits. We held that CAPECO's evidence was not sufficient to conclude there was no causal relationship to Coastal's lost sales or profits. Thus, we found no basis to reverse the jury's implicit finding of actual injury to competition. We stated:

> [R]egardless of whether these costs were factored directly into the prices that Coastal offered, or were later calculated into Coastal's bottom line, these costs affected Coastal's pricing. Certainly, no argument can be made from this evidence alone that bunker fuel costs, no matter when accounted for, were not causally connected to Coastal's lost profits.

Id. at 194.

Our discussion of the damages awarded at the first trial focused on only two issues, although others were raised. The first was whether Coastal, as a new market entrant, was required to use the "yardstick" method as opposed to the "before and after method" of calculating damages. The second was the possibility of an excessive recovery. Because we were vacating and remanding for further proceedings on the second issue, we did not decide the first issue (the methodology for calculating damages) or any other issues. We did not reach CAPECO's challenges to Coastal's expert testimony, in particular CAPECO's claim that Coastal's expert should not have been permitted to calculate going-concern damages as of 1996, rather than as of the date in 1993 that Coastal went out of business. *See id.* at 200-01.

III

A. *The Further Proceedings*

The parties disagreed about what should happen on remand. CAPECO argued for a new trial in order to reopen issues of injury in fact and causation as well as to determine the appropriate amount of damages. In contrast, Coastal asked the court to enter a verdict of $1.5 million (before trebling) under Federal Rule of Civil Procedure 49(a) on the ground that there had been no inclusion of monopolization damages in the verdict and therefore no duplication in that sum.

The district court rejected both CAPECO's and Coastal's arguments. With regard to CAPECO's arguments, the court stated that CAPECO could not reopen the issue of price-discrimination liability, because remand was for determination of damages only. *See Coastal Fuels of Puerto Rico, Inc. v Caribbean Petroleum Corp.*, Civ. No. 92-1584, slip op. at 3-4 (D.P.R. Mar. 5, 1997). With regard to Coastal's request, the

court stated that "[c]onsideration of the flawed [monopolization] claim may have affected the verdict, and it is impossible to tell whether or to what extent it did." *Id.* at 9. The court thus ordered "a new trial by jury to determine damages due solely to price discrimination." *Id.* at 10. The court concluded that any objection to the "before and after" methodology had been waived by CAPECO. It also concluded that "the methodology used is adequate, particularly in light of the relatively relaxed standard for establishing the amount of damages." *Id.* at 11.

B. *Evidence at the Second Trial*

Executives at Coastal and its affiliated companies testified they had prepared a business plan which projected that Coastal would initially sell about 100,000 barrels a month. The prospective customers were expected largely to come from customers who bought from Coastal's sister companies' operations at other ports. Coastal's plan called for a gross margin of $1.65 per barrel (compared with Harbor and Caribbean's respective margins of $1.79 and $1.83 per barrel). Coastal's market share rose over its first several months of operation, reaching 27% in December 1991. Its share thereafter dropped to 15% over 1992; Coastal claims that this drop resulted from its competitors passing on CAPECO's discriminatory discounts to their customers.

Coastal's principal damages witness, Robert Sherwin, did not use either a "yardstick" or a "before-and-after" methodology but rather what Coastal calls a "but-for" methodology.[3] Sherwin's choice of methodology was supported

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[3] The description of Coastal's economic analysis methodology as a "but-for" methodology is itself puzzling. As one set of commentators has noted as to the

(continued...)

by the testimony of another Coastal expert, Professor Bradford Cornell of UCLA. Sherwin calculated total damages near $8 million, roughly consisting of two components. He calculated lost profits from 1991 to 1996 at $3.475 million. This component in turn included actual lost profits from 1991 to 1993 and projected lost profits from 1993 through 1996. As in the first trial, he also calculated Coastal's going-concern value. In the first trial, Sherwin valued Coastal's going concern value at $4.379 million as of the end of 1996. At the second trial, he valued Coastal's going concern value at $4.49 million as of the end of 1996. At the second trial, the choice of 1996 was

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[3] (...continued)
measure of antitrust damages:

> The plaintiff must show that the defendant's illegal conduct prevented the plaintiff from doing better than it actually did. The plaintiff must therefore project a hypothetical or "but-for" condition that excludes only the effects of the defendant's illegal conduct. The difference between that projected condition and the plaintiff's actual condition (both stated in terms of some standard index, like profits or prices) is the claimed measure of damages. . . .
>
> . . . The plaintiff must project what its performance would have been in the damage period but for the violation from a base experience unaffected by the violation.... The relevant actual causal factors are determined by the evidentiary foundation the plaintiff offers for its projection.... [T]he most common evidentiary foundations [are]: the plaintiff's own performance before (or after) the illegal conduct or the performance of some "yardstick" firm.

R. Blair & W. Page, *"Speculative" Antitrust Damages*, 70 Wash. L.Rev. 423, 426-28 (1995) (footnotes omitted). "But-for" describes plaintiff's causation burden: it does not describe an economic methodology for calculating what plaintiff's "but-for" income or profits would have been. "But for" is what plaintiffs must prove and that burden is there even when the "yardstick" or "before and after" methods, two accepted methods of economic analysis, are used. Saying that is not to say one way or another whether there was an adequate evidentiary foundation in economic theory for the testimony of plaintiff's expert under *Daubert*, *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594-95, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); only that it is misleading to use the "but-for" label in this context.

justified as the first date near which there was market stability. Although at the first trial Sherwin testified that Coastal's actual damages were approximately $7 million, in the second trial he apparently modified his analysis to take account of actual events in 1994 and 1995, after the first trial. It should also be noted that the $7 million at the first trial also included monopolization damages, but the $8 million damages estimate at the second trial did not. Sherwin did testify that the imposition of the tax on bunker fuel in mid-1992 meant, apart from any price discrimination, that Coastal would not have made its projected $200,000 profit for that year. Further, he testified that in 1993, due partially to the excise tax, Coastal would have lost over $300,000.

CAPECO's primary damages expert was Professor Jerry Hausman of MIT. For purposes of his analysis, he calculated what Coastal's market share would have been, absent price discrimination, and compared his results with what actually happened. Hausman testified that Coastal's market share, around 16%, would not have changed if there had been no price discrimination, that Coastal lost no sales as a result of price discrimination, and that at most it lost margin on sales actually made. He calculated these lost-margin damages at $106,000. However, his testimony on market share and his damages calculation were stricken by the district court and the jury was told to disregard his testimony. Coastal characterizes this exclusion as justifiably based on *Daubert* and Rule 26 grounds; CAPECO believes that the court erred under *Daubert* and Rule 26.

Dr. Hausman also testified that Coastal would have gone out of business in April 1993 even absent price discrimination and so there was no basis for post-April 1993 damages. This later testimony was apparently also stricken.

After cross-examination, the court instructed the jury to disregard Hausman's testimony, stating:

> I have excluded . . . all of Dr. Hausman's testimony concerning his damages report. . . . That is no longer evidence. . . . It is not a fact in the case, and it should not enter into your considerations when you go to deliberate.

CAPECO's other expert, Dr. Freyre, made no independent calculation of damages, but testified that the excise tax had a bigger effect on Coastal than the price discrimination and that Sherwin's market-share analysis was based on unreasonable assumptions.

IV

A. *Damages Instructions*

The parties clash over whether the district court erred in its instructions to the jury regarding damages and whether it was permissible for the jury to award lost profits up to the time of trial in 1998 and going-concern value[4] as of that date. We find error.

> The relevant portion of the court's instructions stated: Plaintiff claims it is entitled to recover any profits it lost as a result of the price discrimination caused by the

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[4] The going-concern value is what a willing buyer given all available information would have paid a willing seller. *See* 2 P. Areeda & H. Hovenkamp, *Antitrust Law* § 365b4, at 243-44 (rev. ed.1995) (noting that going-concern value "would ordinarily be the same as anticipated future profits, capitalized and discounted to the present and also discounted for future risk" (footnotes omitted)).

> defendant. Profit in this sense is net profit, and simply means the amount by which plaintiff's gross revenues would have exceeded all of the costs and the expenses that would have been necessary to produce those revenues.
>
> Plaintiff also claims it is entitled to damages for future lost profits as a result of the price discrimination caused by the defendant. If you find that defendant's price discrimination has caused plaintiff to lose profits it could otherwise reasonably expect to earn in the future, you may award plaintiff damages for those future lost profits.
>
> And in computing future profits, the law provides that the plaintiff may recover his lost profits from the date it cease[d] doing business [in 1993] until a date at or near trial, and in addition, its going-concern value as of that day.

No instructions were given as to the meaning of going-concern value. CAPECO preserved its objections relevant to this appeal, and neither party claims that this issue was resolved by our prior opinion in this case.

The trial court essentially set three damage periods: (a) damages until Coastal went out of business in 1993; (b) damages from 1993 until the time of the 1998 trial; and (c) Coastal's going-concern value as of the 1998 trial. For purposes of the verdict form, damages from periods (a) and (b) together were given as a single sum—only going-concern damages were specifically separated out on the verdict form. These three periods differed somewhat from the periods used by Sherwin, Coastal's damages expert. Sherwin broke the damages down into actual damages prior to March 31, 1993, lost profits

from that date until December 31, 1996, and going-concern damages as of the end of 1996. We do not know whether the jury estimated going-concern value as of December 31, 1996, as Sherwin testified, or as of a date closer to trial in 1998, as the court instructed. In any event, whether the calculation was done as of the end of 1996 or as of early 1998 makes no difference to our finding that going-concern damages should have been calculated as of early April 1993. As explained below, we think the calculation of going concern value should normally be as of the date the company goes out of business. Of the various damages models available, that model is most likely to be accurate.

CAPECO first attacks the latter two categories of the district court's instructions—lost profits and going-concern value—and of Sherwin's calculations. CAPECO argues that the court erred in instructing the jury that it should assess Coastal's going-concern value (and consequently future lost profits) as of a time near trial in 1998, not the time Coastal left the San Juan market in April 1993.[5] We find that the court erred in its instructions and that lost profits were limited to the period Coastal was actually in business and going-concern value should have been calculated as of the date Coastal went out of business.

The court did not instruct the jury that the jury could find going-concern value as of some time between 1993 and the 1998 trial date, or as of the time Coastal went out of business in 1993. Nor did it so instruct as to the calculation of lost future profits. Because of this lack of alternatives, the court's

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[5] In the first trial the district court did not ask the jury to determine going-concern value. Instead, the court told the jury that it could award both actual lost profits and projected future lost profits. The first jury combined total damages into one aware of $1.5 million.

instructions could effectively be understood to tell the jury that if it awarded damages for future lost profits or for going-concern value, it had to do so calculating those damages respectively to a date at or near trial and as of a date at or near trial. This was error, because the court could not direct the jury to assume the hypothesis was true that Coastal would have remained in business until 1998. But the instruction was also wrong for other, more fundamental reasons.

The parties' arguments help frame the problem. CAPECO contends that, as a matter of law under our decision in *Farmington Dowel Products Co. v. Forster Manufacturing Co.*, 421 F.2d 61 (1st Cir. 1970), and as a matter of the facts of this case, there was no basis to go beyond 1993 as to either going-concern value or lost profits. It says Sherwin's estimate of going-concern value was excessively speculative because the estimate was based on assumptions that CAPECO would not have terminated its relationship with Coastal, regardless of price discrimination, that Coastal would have nonetheless remained in business beyond 1993, and that Coastal would have remained and enjoyed a permanent advantage in the San Juan market once CAPECO closed its refinery in 1995. According to CAPECO, the difference in the choice of date at which to make a calculation of going-concern value is significant because in 1993 Coastal was unprofitable, had no likelihood of becoming profitable, and thus had no going-concern value, due both to the tax and to Coastal's lack of a local supplier of bunker oil.

Coastal, in turn, contends that assessing market conditions as of 1993 would have been inappropriate because market conditions were "abnormal" due to the combination of the excise tax and the price discrimination. Market conditions, it says, were much more stable by the end of 1996, thus permitting a more accurate evaluation of Coastal's going-concern value.

The principle that an antitrust plaintiff may recover both actual lost profits and diminution in the value of its business is well established. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 561-67, 51 S.Ct. 248, 75 L.Ed. 544 (1931). Where plaintiff has been forced out of business, however, it is awarded its going-concern value or its projected future lost profits, but not both. Usually courts follow the *Farmington Dowel* model and award going-concern value for a company which is no longer in business. *See Farmington Dowel*, 421 F.2d at 81; 2 P. Areeda & H. Hovenkamp, *Antitrust Law* § 365b4, at 243 (rev. ed.1995) (stating that damages for a plaintiff who is forced out of business "would ordinarily be measured by its capital value: the price at which he could reasonably have sold the business as a going concern"). The choice of date on which going-concern damages should be evaluated has appropriately focused on whether a particular means of evaluating a firm's going-concern value would be excessively speculative.

In *Farmington Dowel*, this court required that plaintiff's damages be calculated as of the date plaintiff went out of business, as opposed to a date close to trial, some ten years later. *See Farmington Dowel*, 421 F.2d at 81. *Farmington* rejected the method urged by plaintiff because it

> would have required an estimate of profits for a period of some ten years during which the company neither existed nor made profits, plus an estimate of the going-concern value . . . of a company which had ceased being a going concern over ten years before, which estimate would have involved a further estimate of profits for a more remote future period.

Id. Substitute "four years" for the "ten years" in *Farmington Dowel* and we have the same situation here.

In *Farmington Dowel*, we noted that evaluating going-concern value at a date "long after the company ceased to be a going concern" relied "too heavily on speculation and conjecture." *Id.* A number of other circuits similarly have estimated going-concern values as of the date the plaintiff ceased doing business. *See e.g., Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 986 n. 20 (5th Cir. 1977) ("Lost capital value is to be determined at the date that a business ceases to do business."); *Albrecht v. Herald Co.*, 452 F.2d 124, 130-31 (8th Cir.1971), *abrogated on other grounds by State Oil Co. v. Khan*, 522 U.S. 3, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997). *But see Southern Pines Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 826 F.2d 1360, 1363-64 (4th Cir.1987). In addition, we have remanded or reversed antitrust cases where we have found that significant error by the trial court may have contributed to the jury award. *See, e.g., Sullivan v. National Football League*, 34 F.3d 1091, 1106-1113 (1st Cir.1994) (invalidating a $51 million jury verdict for antitrust damages due to trial court error in jury instructions).

Coastal contends that its facts are different from those in *Farmington Dowel*, and in particular that the length of time between the date Coastal was forced out of business and the date of the second damages trial (more than four years later) was not so long as to render a date near trial excessively speculative. Coastal also contends that going-concern value is best estimated given reasonably normal business conditions, a general proposition with which Dr. Freyre, one of CAPECO's

experts, agreed.[6] Coastal then argues that such conditions only existed after the tax was repealed.

We conclude that the *Farmington Dowel* framework—that going-concern value should be evaluated as of the time plaintiff goes out of business and actual lost profits awarded only up to that date—is and should be the norm. It may be that in some situations the difference between the date the company went out of business and the date of trial is not great and the issue does not arise in any significant sense. But here, more than four years had passed. We do not adopt a *per se* rule that four years is inherently too great a gap, but we think it raises such risks of speculative evidence that the *Farmington Dowel* framework presumptively applies.

There are significant differences between the methodology followed by Coastal's expert and the trial court instructions on the one hand, and the *Farmington Dowel* framework on the other. The trial court's instructions effectively assumed that Coastal would have existed four years longer than it did, and thus deserved any lost profits for that period. In addition, the jury was asked to give additional damages for going-concern value as of 1998. The *Farmington Dowel* framework, in contrast, asks what a reasonable buyer would have paid for Coastal in 1993 (rather than in 1998, where any going-concern value assumes Coastal survives until 1998). That is a very different question.

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[6] Dr. Freyre apparently agreed with Coastal's argument that going-concern value should be assessed at a time of market stability, stating that "if [a firm] was damaged . . . you should apply the regular business conditions." But Freyre did not state when he believed such existed, although he stated that such conditions did not exist while the excise tax was in place.

The burden is on the plaintiff to show circumstances which warrant choice of some date other than the date the company went out of business and that the evidence proffered is not speculative. Coastal has not made that showing and is thus bound by the *Farmington Dowel* framework.

Coastal contends that it is excused from using the date the company went out of business because going-concern damages should be considered only at a time of market stability. There are several responses. First, whether that proposition is true depends upon context. Inherent instability in a market (for reasons other than defendant's violation of law) hardly warrants building in an assumption that the company would have survived such instability. Second, given the facts of this case, this is a hollow argument. Although the Puerto Rico excise tax may have made the market unstable, this market appears to have been inherently unstable: numerous competitors entered and exited the San Juan market during the period this dispute covers and the price of bunker fuel fluctuated widely. There is little reason to suggest that the market was more stable as of the date of trial—when CAPECO had actually shut its refinery several years earlier. It may be that in certain cases temporary market instability will provide a ground for departing from the rule we articulate here, but this is not such a case.

The third response is that market stability four or ten years later does not mean that the exercise of estimating lost profits or going-concern damages over that intervening period is not speculative. That Coastal's choice of date on which to calculate its going-concern damages was arbitrary, and thus speculative, is highlighted by the fact that the district court and Sherwin actually selected different dates on which the going-concern valuation should be made—Sherwin argued that the calculation should be done as of the end of 1996, while the court instructed the jury to perform the calculation as of a date

near the February 1998 trial. This in turn raises the prospect that there may have been an additional error in an impermissible overlap of fourteen months in the awards of lost profits and going-concern value if the jury used Coastal's expert's date and calculations to determine going-concern value and the district court's date to calculate lost profits.

The use of a date more than four years after the actual events, on the facts of this case, strikes us as a speculative enterprise, and Coastal's justification does not suffice. In *Sullivan v. Tagliabue*, 25 F.3d 43 (1st Cir.1994), we commented that damages were likely speculative where "the asserted harm . . . is indirect, and likely the result, at least in part, of independent intervening factors" and where damages are difficult to calculate. *Id.* at 52. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), the Supreme Court commented that an antitrust damage claim was highly speculative where harm was "indirect" and "may have been produced by independent factors." *Id.* at 542.

Further, our sense that Coastal's methodology is very speculative is confirmed by what actually happened. Here, because of the lapse of time, we have some information about later market conditions. That information confirms our earlier judgment that this case requires adherence to the *Farmington Dowel* format. CAPECO argues that awarding damages to Coastal as if it had remained in business involves assuming too many links in the causal chain: that Coastal would have stayed in business despite the tax, that Coastal would then have been well-positioned to reap the benefits of the repeal of the tax, and that Coastal would have survived the closing of the CAPECO

refinery and would have been even better placed to take advantage of CAPECO's closing of its refinery.[7]

These links are sufficiently questionable as to reinforce the use of the *Farmington Dowel* methodology. Coastal's San Juan business was not profitable during the short time it was in business. It lost over $2 million in eighteen months. Indeed Coastal's own expert said that Coastal would have lost $300,000 in 1993. But while Coastal presented evidence regarding the profits it might have earned had it still been competing in San Juan after 1996, it presented little evidence regarding its ability to become profitable and remain in San Juan up until that date. For example, Coastal presented little evidence showing why it was more akin to Harbor, a competitor with a San Juan market share ranging from 71% to 100% between 1994 and 1996, than to other suppliers that failed to survive. In addition to the assumption that Coastal would have survived in what was by all accounts a very competitive market, there is also the assumption that Coastal would have reaped a windfall from CAPECO's 1995 cessation of refining operations.

At first blush it might seem odd that Coastal would claim to receive a benefit from CAPECO's departure from the market in 1995. CAPECO was, after all, the sole supplier of both Coastal and Coastal's competitors, and loss of a supplier who is a sole source is not usually good news for a company. But Coastal says it was uniquely blessed—it could have brought in supplies from other Coastal operations elsewhere and thus would have gained market share. The argument proves too much. Coastal did not reenter the market when CAPECO

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[7] CAPECO also argues that it would have refused to deal with Coastal regardless of this dispute, and that it is highly unlikely that Coastal would have remained in the San Juan market given this refusal to deal. As discussed later, this was a jury issue, decided against CAPECO.

closed its refinery in 1995 or any time thereafter, despite the potential profits to be made. It is simply too speculative to build in an assumption that coastal certainly would have been able to rely on imports from elsewhere in a hypothetical world. Thus, this case is governed by the *Farmington Dowel* rule that going-concern value is determined as of the date Coastal went out of business.

Farmington Dowel also governs a related aspect of damages. *Farmington Dowel* held that the district court correctly confined plaintiff to the lost profits up until the date the plaintiff went out of business plus the going-concern value on that date. *See Farmington Dowel*, 421 F.2d at 80-82. It follows that lost profits beyond 1993—the profits Coastal claims that it would have received from the date it went out of business until the second trial in 1998—cannot be awarded separately. Projected future profits may be factored into the going-concern value of the firm at the time it went out of business. Coastal may recover actual damages until it went out of business. It may also recover its going-concern value as of that date. But it may not recover both going-concern value and lost profits after that date. As this court said *Farmington*:

> To do so would result in a clear duplication: [the plaintiff] would get its present value as a going concern plus its future profits, but the latter figure would be a major element in determining the former figure.

Id. at 82; *see also* 2 Areeda & Hovenkamp § 365b4, at 244 ("Of course, both future profits and going-concern value may not be granted in a given case, for that would be double counting. Furthermore, any such damages must be reduced by revenues made possible by the termination." (footnote omitted)).

We know that the second verdict assigned $2 million to the going-concern value, a value instructed to be calculated as of 1998. This means the jury assigned $2.5 million to the remaining damages—that is, damages from Coastal's inception until coastal went out of business in 1993 plus damages from 1993 until 1998. Because we are unable to assign a portion of the damages to the losses Coastal suffered prior to March 1993, we cannot save any portion of the verdict. Thus, if the parties are unable to resolve the matter, it must go back for yet another damages trial.

At that trial Coastal is confined to its actual lost profits as of the date it went out of business in 1993, plus its going-concern value calculated as of that date but for CAPECO's price discrimination. This means what a willing buyer would have paid for Coastal in early April 1993.[8] We emphasize that the going-concern value is not necessarily zero. The mere fact that Coastal had never earned profit to that point does not mean it had no value as a going concern. *See Heatransfer Corp.*, 553 F.2d at 986 n. 20 ("[T]he Court does not believe that a going concern, which is the victim of an anti-competitive practice, must forego damages for sales it would have made as the result of the natural expansion of its business simply because it was

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[8] An issue may arise concerning what role the subsequent real-word events should play in determining such a value. *See generally* Note, *Private Treble Damage Antitrust Suits: Measures of Damages for Destruction of All or Part of a Business*, 80 Harv. L.Rev. 1566 (1967). Any model attempting to estimate going-concern value bears risks of not accurately capturing in a hypothetical world what would have happened in the real world if there were no price descrimination. This is true of evidence of post-1993 real world events as well. The parties may be able to reach agreement on a model. If not, the trial court will have to exercise its gatekeeper function as to both relevance and reliability. *See Kumho Tire Co. v. Carmichael*, ___ U.S. _____, 119 S.Ct. 1167, _____, _____ L.Ed.2d _____ (1999). But because no one has briefed the issue to us, we do nothing more than note the issue.

victimized early in its existence before its attempts to expand could ripen into evidence of preparedness and intent to increase its output."); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 23 n. 12 (5th Cir.1974) (rejecting an argument that a business that was not profitable as of the time it went out of business should be valued at zero, and commenting that "[t]o deny recovery to a businessman who has struggled to establish a business in the face of wrongful conduct by a competitor simply because he never managed to escape from the quicksand of red ink to the dry land of profitable enterprise would make a mockery of the private antitrust remedy").

B. *CAPECO's Argument Against Any Going-Concern Value*

CAPECO makes two other arguments which it says mean that the jury could not even consider whether to award going-concern damages at all: CAPECO contends that its refusal to deal with Coastal after March 1993 was completely legal and therefore no antitrust damages could lie after the termination, and that awarding damages after that date would constitute a duplicative recovery. These arguments are different from its argument that *Farmington Dowel* must apply. The logic of these arguments would require entry of a verdict in CAPECO's favor on all claims except claims for the actual damages Coastal suffered prior to CAPECO's cessation of business on March 31, 1993. We reject both arguments. We also reject CAPECO's argument that the jury was required to conclude that Coastal suffered no damages before March 31, 1993 as a result of the price discrimination.

First, CAPECO argues that this court "held that CAPECO's refusal to deal with Coastal after March 31, 1993 did not violate the antitrust laws." From this CAPECO argues that it cannot be responsible for any damages stemming from Coastal's going out of business or damages after that date. Whether or not the

syllogism is sound, the premise is not. This court did not hold that CAPECO's refusal to deal was not illegal.[9]

Further, the evidence fully supported the district court's finding that "there was sufficient evidence upon which the jury could conclude that Coastal closed down its operations because of the price discrimination." April 23, 1998 slip op. at 4. Coastal presented testimony from Daniel Hill, the former chairman of Coastal Fuels of Puerto Rico, that Coastal departed from the San Juan market because of the price discrimination and refusal to deal. As the district court noted, "CAPECO had a full opportunity to cross-examine Mr. Hill based on his 1994 testimony and did so. Any questions as to credibility were for the jury." *Id.* CAPECO's refusal to deal was a direct result of Coastal's filing of this lawsuit and thus of CAPECO's price discrimination. We need not determine whether CAPECO's price discrimination directly forced Coastal out of business or whether price discrimination led to the refusal to deal and thus Coastal's demise; in any event, sufficient evidence was presented to the jury for it to find that Coastal's going out of business was causally linked to CAPECO's illegal behavior.

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[9] Earlier, in ordering the reversal of the award of antitrust damages, we commented that "[i]n coming to its conclusion, the jury may well have weighed harms resulting from conduct that was pleaded with respect to the monopolization offense (*e.g.* refusal to deal with a customer, lying, etc.) but would have been additional to harms resulting from price discrimination, the claim we uphold." *Coastal Fuels*, 79 F.3d at 200-01. This statement does not support CAPECO's claim that its refusal to deal precludes the award of post-1993 damages. The mention of refusal to deal here was merely an example of a *possible* area where facts alleged with regard to the monopolization claims would not have been relevant to the price-discrimination claims. *Cf. id.* 201 n. 16 ("As a practical matter, it would be difficult, if not impossible, for a juror to segregate antitrust damages due to a monopolization offense but not due to illegal price discrimination from antitrust damages due only to price discrimination, where as here, the facts and conduct involved in both allegations greatly overlap.")

In contrast to the evidence presented by Coastal that the refusal to deal was a direct result of CAPECO's price discrimination, CAPECO has cited no portion of the record that supports its contention that it would have cut Coastal off absent the price discrimination and ensuing lawsuit, apparently because CAPECO did not introduce any such evidence.[10] *See id.* at 5 ("CAPECO cites no authority to sustain its assertion that a defendant who is engaging in price discrimination must be allowed to stop the accrual of a plaintiff's damages by refusing to deal . . . . CAPECO presented no testimony as to the refusal to deal and, in fact, never argued to the jury that Coastal was not entitled to any future profits because of the refusal to deal."). Given this failure, we agree with the district court's determination "that the jury had sufficient evidence upon which it could have concluded that Coastal's . . . decision to close operations [was] due to price discrimination." *Id.* We consider this issue—of whether damages from Coastal's going out of business were causally related to the price discrimination—to have been resolved against CAPECO by at least the second (and perhaps the first) jury, and CAPECO is not free to argue otherwise on remand.[11]

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[10] CAPECO did attempt to have its damages expert, Jerry Hausman, testify that Wilfredo Rodriguez, the CAPECO executive who had written a letter to Coastal threatening to cut off Coastal's supply of fuel if this action was not dropped, had indicated that CAPECO would have cut off supply to Coastal even absent the lawsuit. This statement was stricken as hearsay and improper expert testimony. In its brief to this court in the prior appeal, CAPECO took a position at odds with its current argument when it stated that it stopped selling fuel to Coastal "after having previously advised Coastal of its policy of not doing business with customers litigating against it."

[11] We reach this conclusion despite the instructional error on burden of proof described later because of the complete paucity of evidence to support CAPECO's argument.

C. *Duplication of Tort Recovery*

CAPECO's argument that the price-discrimination recovery duplicated the tort recovery in the first trial fails. CAPECO contends that the tort award from the first trial was, in effect, an award of lost profits for the period after 1993, and thus that any post-1993 damages for price discrimination would constitute a duplicative recovery. The district court rejected this contention, noting that "Coastal's expert testified only as to damages resulting from price discrimination and CAPECO presented no evidence that any part of Coastal's damages were occasioned by CAPECO's tortious conduct." *Id.* at 15. In its brief to this court, CAPECO does not point to evidence in the record that suggests otherwise.

More importantly, this court earlier found that CAPECO had waived its duplicative recovery argument. We explicitly rejected CAPECO's claim that a new trial on liability or a remittitur was required because an award of damages for price discrimination would be duplicative of the tort award. *See Coastal Fuels*, 79 F.3d at 201-02. That issue was foreclosed, should not have been raised here, and may not be raised again.

D. *Other Instructions*

There was another type of error in the jury instructions. That error has to do with the burden of proof. The judge instructed the jury that "Coastal is not required to prove the amount of its damages with any certainty." As stated, the instruction was acceptable. The court expressly instructed the jury that because the first trial had determined that CAPECO's price discrimination had caused injury to Coastal, the jury's only function was to determine the amount of the damages. Although the district court was correct as to the scope of the remand—to determine the amount of damages—in doing so the

court went on to expressly instruct the jury to disregard the preponderance-of-the-evidence standard and to apply a lesser standard: "At the beginning of the case I mentioned to you preponderance of the evidence. You must put that out of our mind, because in a price discrimination case such as this one, a lesser standard is applied." That was error.

The district court thought its instruction was required by statements in our prior opinion. *See* April 23, 1998 slip op. at 3, 8 (citing *Coastal Fuels*, 79 F.3d at 200). The confusion in this area starts with the language of the 1931 Supreme Court decision in *Story Parchment*. *Story Parchment* was a Sherman Act conspiracy-to-monopolize case in which the three defendant companies conspired to destroy the plaintiff company, a new entrant in the field, by so cutting their previously stable prices that the prices fell first below the point of fair profit and later below the costs of production. The jury awarded damages based on evidence comparing the old prices, which were reasonable and which the jury found would have been maintained but for the unlawful acts, with the prices actually received. The circuit court reversed the verdict, concluding there was no basis for a reasonable inference that prices in excess of those actually realized would have prevailed if there had been no unlawful combination, and that in any event the damages were based on speculation and conjecture. The Supreme Court disagreed and said, famously:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and

> reasonable inference, although the result be only approximate.

Story Parchment, 282 U.S. at 563. It was from this language that the district court picked up its "just and reasonable inference" language, and it is presumably on this same language that the court based its instruction that plaintiff bore a burden of proof of less than a preponderance of the evidence. We read *Story Parchment* to hold that the amount of damages is an issue on which reasonable estimates based on inferences are permissible. But this does not mean that the jury is free to act on less than a preponderance of the evidence. *See generally Story Parchment*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544; *see also J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 378-79, 47 S.Ct. 400, 71 L.Ed. 684 (1927). In *Story Parchment*, the Court distinguished between two different situations involving uncertain damages: one, where uncertain damages are not recoverable because they are not the certain result of the harm; the other, where damages are recoverable because the fact of damage is "definitely attributable to the wrong and only uncertain in respect of [the] amount." *Story Parchment*, 282 U.S. at 562.

The district court used the well-worn phrase from *Story Parchment* outside of its normal context—a trial encompassing both liability and damages—where the phrase is usually thought to mean only that an antitrust plaintiff need not "establish the amount of damages with mathematical precision." ABA Section of Antitrust Law, *Antitrust Law Developments* 785 (4th ed.1997). Its use was inappropriate here.

The greater flexibility described in *Story Parchment* recognizes the difficult task of "quantifying the difference

between what actually happened and what would have happened in a hypothetical free market." *Fishman v. Estate of Wirtz*, 807 F.2d 520, 550 (7th Cir.1986). It is one thing to say there needs to be some flexibility in proving the amount of damages relating to hypothetical events. Such flexibility is needed both in practical terms given the nature of the proof, and to avoid rewarding a wrongdoer for its misconduct. It is quite another thing to suggest that an antitrust plaintiff does not need to show *probability* that the damages caused by the wrongdoer's misconduct fall within a reasonably estimated range of damages.

V

A. *Expert Testimony*

Some issues which may come up at retrial deserve brief attention. First, CAPECO complains about the exclusion of most of the testimony of Dr. Hausman, its expert. We review a district court's decision to admit or exclude expert testimony for abuse of discretion. *See Kumho Tire Co. v. Carmichael*, ____ U.S. _____, 119 S.Ct. 1167, _____, _____ L.Ed.2d_____ (1999); *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 LEd.2d 508 (1997); *Licciardi v. TIG Ins. Group*, 140 F.3d 357, 362-63 (1st Cir.1998); *Newell Puerto Rico, Ltd. v. Rubbermaid Inc.* 20 F.3d 15, 20 (1st Cir. 1994).

CAPECO argues that the court excluded Dr. Hausman's testimony because it erroneously found his economic oligopoly theory unacceptable. If that was what had happened, we would have considerable sympathy for CAPECO's argument. *Cf. Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594-95, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 161 F.3d 77, 85 (1st

Cir.1998) (stating that *Daubert* requires "that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion").[12]

But our reading of the record is that the more likely basis for the exclusion was the district court's belief that there was considerable and unjustified variance between the expert's Rule 26 report and his testimony, and that the district court found that Hausman had unintentionally misled the court into believing that he had performed certain crucial calculations when he had not in fact done them. Such a ruling would hardly be an abuse of discretion. *See Licciardi*, 140 F.3d at 364 (stating that expert testimony should have been excluded where such testimony went "far beyond the scope of [the expert's] report"); *cf. Eastern Auto Distribs., Inc. v. Peugeot Motors of America, Inc.*, 795 F.2d 329, 338 (4th Cir.1986); *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1580-81 (11th Cir. 1985); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir.1977). At any damages retrial there will be new expert testimony and such a problem should not recur.[13]

B. *Damages Calculation Methodology*

Separate from its array of other challenges, CAPECO argues that the district court should have compelled the parties to use the "yardstick" method for calculating damages, rather

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[12] The district court's gatekeeping function extends to all expert evidence, including economic analysis, not merely to evidence involving scientific conclusions. *See Kumho Tire*, 119 S.Ct. at _____ - _____.

[13] Given our finding that a new damages trial is required, we need not reach CAPECO's claim that Coastal's evidence, and in particular the testimony of Sherwin, was insufficient to support the jury award.

than the "before and after" method. CAPECO contends that the yardstick method is mandated by this court's opinion in *Home Placement Service, Inc. v. Providence Journal Co.*, 819 F.2d 1199 (1st Cir.1987). We considered this precise issue in our review of the first trial. We decided that "[u]ltimately, the proper method should be determined by the district court in accord with the facts of the situation. In this case, the district court will have exactly that opportunity [on remand] . . . . " *Coastal Fuels*, 79 F.3d at 200.

In its brief, CAPECO contends that Coastal's "undisputed [lack of a] track record in San Juan" (emphasis omitted) should have mandated the use of the yardstick method, but fails to address the district court's finding that this issue had been waived. CAPECO has waived its argument that the yardstick method is required, and is foreclosed from raising it again.[14]

VI

Given our holdings, we need not reach the myriad of other claims CAPECO has raised. Our disposition means that this matter must be remanded and there will be, sadly, yet a third trial (although quite limited) in this case. We are distressed to remand for a new damages trial when two juries have already spoken. It would seem in the interests of both parties to reach an agreement resolving the issue of the damages to be paid for CAPECO's price discrimination.

The case is remanded for a new trial on damages on the price discrimination claim in accordance with this opinion.

No costs are awarded.

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[14] Of course, both CAPECO and Coastal can attack the admissibility or validity of expert testimony on other grounds at retrial. And the district court, under *Daubert*, is free to make its own determinations as to whether, on the facts presented at remand, a particular methodology is adequate.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1652

COASTAL FUELS OF PUERTO RICO, INC.,
Plaintiff, Appellee,

v.

CARIBBEAN PETROLEUM CORPORATION,
Defendant, Appellant.

JUDGMENT

Entered April 14, 1999

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The case is remanded for a new trial on damages on the price discrimination claim in accordance with this opinion.

By The Court

PHOEBE MORSE, Clerk

By: Janice M. O'Neil
Chief Deputy Clerk

[cc: Mr. Patton, Mr. Yauch]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1652

COASTAL FUELS OF PUERTO RICO, INC.,
Plaintiff, Appellee,

v.

CARIBBEAN PETROLEUM CORPORATION,
Defendant, Appellant.

ORDER OF COURT

Before: Hall, Senior Circuit Judge*
Lynch, Lipez, Circuit Judges

Entered May 21, 1999

The petition for rehearing is denied.

Coastal's petition argues that this court imposes a "new restriction on the methods available to a plaintiff to estimate its damages." The opinion does not do so, but explicitly states that "[w]here plaintiff has been forced out of business . . . it is awarded its going concern value or its projected future lost profits, but not both" (p. 17)

Plaintiff in the first two trials chose to present a going concern theory of damages. The limited remand for a third trial, which confines the damages to actual lost profits and going concern value, is in accord with plaintiff's choice theory.

By the Court

PHOEBE MORSE, Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk

cc: Mssrs. Jimenez, Perez, Bennezar, Garcia, Patton, Antongiorgi, Garcia, Martinez, Yauch, Bowman, Boneta, Ms. Willis,

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1652

COASTAL FUELS OF PUERTO RICO, INC.,
Plaintiff, Appellee,

v.

CARIBBEAN PETROLEUM CORPORATION,
Defendant, Appellant.

ORDER OF COURT

Before:
Torruella, Chief Judge
Hall, Senior Circuit Judge*
Selya, Boudin, Stahl, Lynch, Lipez, Circuit Judges

Entered May 21, 1999

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be reheard by the Court en banc,

It is ordered that the petition for rehearing en banc be denied.

By the Court

PHOEBE MORSE, Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk

cc: Mssrs. Jimenez, Perez, Bennezar, Garcia, Patton, Antongiorgi, Garcia, Martinez, Yauch, Bowman, Boneta, Ms. Willis,

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MANDATE
[Entered June 1, 1999]

No. 98-1652

COASTAL FUELS OF PUERTO RICO, INC.,
Plaintiff, Appellee,

v.

CARIBBEAN PETROLEUM CORPORATION,
Defendant, Appellant.

JUDGMENT
Entered April 14, 1999

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The case is remanded for a new trial on damages on the price discrimination claim in accordance with this opinion.

By the Court

[Illegible] Jun 1 1999

/s/ Janice O'Neil
Chief Deputy

By the Court

PHOEBE MORSE, Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk

Per the direction of this Court, this case on remand should be assigned to a judge different from the judge who handled this case previously.

[cc: Mr. Patton, Mr. Yauch]

s/c: Operations Mar
6/3/99 [Illegible]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1652

COASTAL FUELS OF PUERTO RICO, INC.,
Plaintiff, Appellee,

v.

CARIBBEAN PETROLEUM CORPORATION,
Defendant, Appellant.

ORDER OF COURT

Before:
Hall, Senior Circuit Judge*
Lynch, Lipez, Circuit Judges

Entered July 7, 1999

Upon consideration of appellee's petition to recall mandate,

It is ordered that said petition be denied.

By the Court

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*of the ninth circuit, sitting by designation

PHOEBE MORSE, Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk

cc: Mssrs. Jimenez, Perez, Bennezar, Garcia, Patton, Antongiorgi, Garcia, Martinez, Yauch, Bowman, Boneta, Ms. Willis

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1652

COASTAL FUELS OF PUERTO RICO, INC.,
Plaintiff, Appellee,

v.

CARIBBEAN PETROLEUM CORPORATION,
Defendant, Appellant.

ORDER OF COURT

Before:
Torruella, Chief Judge
Hall, Senior Circuit Judge*
Selya, Boudin, Stahl, Lynch, Lipez, Circuit Judges

Entered July 7, 1999

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active

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*of the ninth circuit, sitting by designation

service and a majority of said judges not having voted to order that the appeal be reheard by the Court en banc,

It is ordered that the renewed petition for rehearing en banc be denied.

By the Court

PHOEBE MORSE, Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk

cc: Mssrs. Jimenez, Perez, Bennezar, Garcia, Patton, Antongiorgi, Garcia, Martinez, Yauch, Bowman, Boneta, Ms. Willis

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

COASTAL FUELS OF PUERTO RICO, INC.,	*	
Plaintiff	*	
v.	*	Civ. No. 92-1584 (PG)
CARIBBEAN PETROLEUM CORPORATION,	*	
Defendant	*	

OPINION AND ORDER

On March 10, 1998, defendant, Caribbean Petroleum Corporation (CAPECO), filed motions for judgment as a matter of law, for a new trial or *remittitur* of damages. Plaintiff, Coastal Fuels of Puerto Rico, Inc. (Coastal), opposed those motions of March 25, 1998. The Court has carefully considered the grounds set forth in CAPECO's motions and their accompanying memorandum of law, and the grounds and arguments countered in Coastal's opposition. The Court denies CAPECO's motions for the reasons expressed hereinafter.

A trial court confronted with a motion for judgment as a matter of law, must scrutinize the proof and the inferences reasonably to be drawn therefrom in the light most hospitable to

the non-movant. *See Rolón-Alvarado v. Municipality of San Juan*, 1 F.3d 74, 76 (1st Cir. 1993); *Lowe v. Scott*, 959 F.2d 323, 337 (1st Cir. 1992); *Santiago Hodge v. Parke Davis & Co.*, 909 F.2d 628, 634 (1st Cir. 1990). The Court may not consider the credibility of witnesses, resolve conflicts in testimony or evaluate the weight of the evidence. *Wagenmann v. Adams*, 829 F.2d 196, 200 (1st Cir. 1987); *Rolón-Alvarado*, 1 F.3d at 77. A verdict may be directed only if the evidence is such "that reasonable minds could not differ as to the outcome." *Rolón-Alvarado*, 1 F.3d at 77.

As the Rule 59 motion for a new trial relates to the sufficiency of the evidence presented, the Court is within the bounds of its discretion to grant or deny such a motion following the reasons for denying or granting a motion for judgment as a matter of law. *See Lama v. Borras*, 16 F.3d 473, 477 (1st Cir. 1994); *Robinson v. Watts Detective Agency, Inc.*, 685 F.2d 729, 740 (1st Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). Within that discretion, the district court may order a new trial, even if the verdict is supported by substantial evidence, if traditional alternative grounds for new trial exist, including errors of law as well as misconduct on the part of the court, counsel or jury. *Lama v. Borras, supra.*

I.

CAPECO contends that plaintiff presented no evidence of a causal nexus between CAPECO's price discrimination and the damages awarded because plaintiff called no customer witnesses, and therefore, allegedly there was no evidence before the jury that plaintiff lost any sales as a result of price discrimination.

The record does not support CAPECO's contention. The Court of Appeals found that Coastal had established "actual

injury" in the first trial based upon evidence that the price discrimination caused lost sales and profits. *Coastal Fuels of Puerto Rico v. Caribbean Petroleum Corporation*, 79 F.3d 182, 194-95 (1st Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 294 (1996). It remanded for a determination of the amount of damages.

Viewed within the context of the lesser standard of proof applicable to the determination of damages in an antitrust case (79 F.3d, at 200), the Court finds that there was sufficient evidence before the jury upon which it could conclude that the damages found were the result of price discrimination. An antitrust plaintiff in a price discrimination case may establish damages based upon estimates and assumptions as long as they rest on adequate data. *See Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir. 1974); *Lehrman v. Gulf Oil Corporation*, 500 F.2d 659 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); and *Hasbrouchk v. Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1988), *aff'd*, 496 U.S. 543 (1990). Plaintiff Coastal presented expert testimony based on projections and assumptions as to what Coastal's market share, margins and profits would have been, absent price discrimination. The jury had evidence before it upon which it could conclude that Coastal's expert's estimates were based on reasonable assumptions and adequate data. As to the expert's assumptions and estimates relating to what Coastal's sales (market share) would have been absent price discrimination, CAPECO had an opportunity to attempt to expose any flaws in those conclusions through cross-examination. *Newell Puerto Rico Ltd., Inc. v. Rubbermaid, Inc.*, 20 F.3d 15, 20 (1st Cir. 1994). Consequently, Coastal presented sufficient evidence upon which the jury could have found that its damages were the result of price discrimination.

CAPECO then claims that Coastal presented no evidence upon which the jury could properly rely to find any damages after March of 1993. That contention is related to CAPECO's judicial estoppel defense, and its contention that a refusal-to-deal caused Coastal to exit the bunker fuel business in April of 1993. The Court finds that there was sufficient evidence upon which the jury could conclude that Coastal closed down its operations because of the price discrimination. The Court reaffirms its prior rulings on the issue of judicial estoppel, now also based on Mr. Hill's testimony at the trial on damages. Mr. Hill's testimony was that Coastal would not have continued in business after the preliminary injunction was denied, corroborated by a sworn statement filed close to a year prior to Coastal's actual shutdown. CAPECO had a full opportunity to cross-examine Mr. Hill based on his 1994 testimony and did so. Any questions as to credibility were for the jury. Judicial estoppel requires that the two positions be "diametrically opposed" such that the "truth of one must necessarily preclude the truth of the other." *FDIC v. CNA Casualty of Puerto Rico*, 786 F. Supp. 1082, 1086 (D.P.R. 1991). No inconsistency approaching this criteria was presented here. Furthermore, the jury could also have concluded that any refusal to deal on the part of CAPECO would not have occurred absent price discrimination and the filing of this action.

CAPECO cites no authority to sustain its assertion that a defendant who is engaging in price discrimination must be allowed to stop the accrual of a plaintiff's damages by refusing to deal. Because an antitrust plaintiff may recover lost future profits when it is forced out of business as a result of conduct prohibited by the antitrust laws, the Court finds no basis for CAPECO's naked assertion as to the law. CAPECO presented no testimony as to the refusal to deal and, in fact, never argued to the jury that Coastal was not entitled to any future profits

because of the refusal to deal. The Court finds that the jury had sufficient evidence upon which it could have concluded that Coastal's losses, and its decision to close operations, were due to price discrimination.

CAPECO claims that as a matter of law, Coastal could not recover for damages suffered after April of 1995. CAPECO argues that because it closed down its refinery in April of 1995, Coastal should have then reentered the market to reap some of the future profits it claimed at trial. The evidence presented at trial was sufficient for the jury to conclude the contrary. Coastal presented evidence that the refinery shut down is not permanent, and that the establishment of a bunker fuel operation in San Juan Harbor is a costly affair. Furthermore, the jury could have considered the fact of this litigation and could have concluded on the basis of the record that CAPECO had an animus against Coastal. Thus, the jury could have concluded that a decision to incur in the substantial investment required to reestablish operations would not have been a rational and economic decision for Coastal to have made faced with the uncertainty of CAPECO restarting its refinery. Consequently, the Court finds that not only is there no evidence to justify any requirement that Coastal had to carry out any such alleged mitigation, but also that the record allowed the jury to come to a contrary conclusion.

II.

CAPECO claims that the Court failed to instruct the jury that there must be a causal nexus between the price discrimination and the damages claimed and that this was harmful error. A review of the Court's instructions reveals them to be proper and adequate. The jury was instructed to "determine the amount of damages suffered by Coastal as a result of the illegal price discrimination by CAPECO." That

language was taken precisely from the Court of Appeal's decision in this case. *Coastal Fuels of P.R. v. Caribbean Petroleum*, 79 F.3d at 194. *See also Hasbrouck v. Texaco, Inc.*, 842 F.2d at 1042.

CAPECO alleges that instructing the jury that "Coastal is not required to prove the amount of its damages with any certainty" was also error. The language in question follows First Circuit decisions. *See Farmington Dowel Products Co. v. Foster Mfg. Co.*, 421 F.2d 61, 81 (1st Cir. 1981); *Coastal Fuels of P.R.*, 79 F.3d at 200. The Court's instruction was well grounded.

CAPECO argues that its proposed jury instruction as to "forms of damages" should have been given. For the reasons expressed above as to the sufficiency of Coastal's evidence on damages, the Court finds that the instructions were adequate and that there was no legal requirement or basis in the record to require anything further than the instructions given. CAPECO's proposed instruction No. 4 would have required a specificity as to proving lost sales and lower margins not required by the law. Because the fact of injury had already been determined by the Court of Appeals, 79 F.3d at 194-195, Coastal's proof of damages could be "indirect" and "include estimates based on assumptions so long as the assumptions rest on adequate data." *See Lehrman*, 500 F.3d at 668; *Terrell*, 494 F.2d at 23.

CAPECO contends that an instruction on mitigation of damages was required because Coastal "cannot recover damages for any period after April 1995." The Court rejected that instruction because there was no evidence to warrant it (*see* discussion *supra*) and because mitigation was not asserted by CAPECO in the Pretrial Order. Furthermore, CAPECO has cited no authority to require the type of mitigation (reestablishment of business operations) claimed by it.

CAPECO's contention that the Court's instructions on the applicable evidentiary standard for establishing antitrust damages "shifted" the burden of proof to CAPECO is frivolous. As stated, the Court's instructions were derived not only from the Court of Appeals' decision in this case but also from well established judicial gloss. Furthermore, the instructions made clear that Coastal had the burden "to produce evidence from which you, the jury, can make a just and reasonable inference as to the amount of damages." This language was also based on the Court of Appeals' opinion in this case. 79 F.3d at 200.

It is ironic that CAPECO complains about a clarifying instruction when CAPECO itself was responsible for creating the situation that made clarification necessary. In the final Pretrial Conference, CAPECO represented to the Court that two issues had been remanded. Based on that representation the Court gave the following preliminary instruction to the jury based directly on language submitted by CAPECO.

> So, your formal function in this trial would be to determine basically two questions, one was the practice of price discrimination by CAPECO against Coastal the cause of any injury to Coastal and secondly, and if it was, what is the amount of any damages sustained by Coastal, if any. (Tr. 1:28).

The "preponderance of the evidence" standard was the correct standard as to the first of these questions. However, the Court of Appeals decision actually resolved the injury issue adversely to CAPECO (79 F.3d at 189, 194-195) and the instruction submitted by CAPECO and given by the Court based upon CAPECO's representation was incorrect. In the final instructions, the Court clarified its preliminary instructions and then gave a correct instruction as to Coastal's burden with respect to the single issue remanded for new trial, the amount

of damages sustained by Coastal as a result of CAPECO's price discrimination.

CAPECO similarly ignores the record when it contends that by failing to give its proposed instructions Nos. 8 and 9 the Court erred. First, the Court instructed the jury that: "You may not award damages for injuries or financial losses from other factors other than price discrimination" and that damages could be awarded only if they were shown to be as "a result of illegal price discrimination." Second, as to CAPECO's claim that it was prejudiced by the failure to adopt its proposed instructions, Coastal's expert's calculations excluded any losses due to the excise tax and damages for non-price-related CAPECO discriminatory conduct by factoring in an increase in Coastal's costs. Those calculations also took competition into account.

CAPECO further contends that the court erred by failing to instruct the jury that going concern value had to be calculated as of the date Coastal ceased operations. CAPECO claims that the Court of Appeals opinion in *Farmington Dowel Products Co. v. Forster Mfg. Co., supra*, sustains its contention. The Court does not read *Farmington Dowel* as required such a result. *See Fishman v. Estate of Wirtz*, 807 F.2d 520, 552 (7th Cir. 1986). *See also Southern Pines Chrysler-Plymouth Inc. v. Chrysler Corp.*, 826 F.2d 1360, 1364 (4th Cir. 1987); *Terrell v. Household Goods Carriers Bureau*, 494 F.2d at 23 n.12. Furthermore, calculating Coastal's going concern value as of 1996 finds support in the record. Three experts (Sherwin, Cornell and Freyre) agreed that going concern value is best calculated in conditions of normal or regular business. No expert testified to the contrary. Considering the business upheavals which occurred during the period of 1993 to 1996 (the excise tax and the shutdown of CAPECO's refinery), estimating going concern after those conditions stabilized finds

support in the record. The going concern multiple advanced by Sherwin based on comparable price earnings rations was both supported and contradicted by other testimony although the methodology was not contested. Dr. Cornell testified that Sherwin's multiplier was appropriate and reasonable, but Dr. Freyre and Dr. Hausman testified that it was too high although they did not testify as to an alternative multiplier. The jury weighed that evidence and reached its own verdict. The Court finds that there is no basis to overrule that verdict.

CAPECO contends that the verdict form used prejudiced it, and that the Court should have used CAPECO's proposed verdict form. CAPECO claims that the verdict form should have included the words "damages, if any" and that the form used allowed the jury to estimate damages without any regard to causation.

As to causation, the verdict form stated that the amount of damages be "the result of" price discrimination. CAPECO's argument that the phrasing of the verdict form was an indication that an award was required fails to take into account the Court's instructions on damages and specifically ignores the Court's instruction to the effect that the "fact that I have instructed you on the proper measure of damages should not be considered as an indication of any view of mine as to whether you should grant any damages or not."

III.

The Court has carefully reviewed the record as it concerns the elimination of Dr. Hausman's testimony relating to his calculation of damages. Dr. Hausman's purported testimony on the amount of damages depended on his analysis as to what Coastal's market share would have been absent price discrimination. During his direct examination, Dr. Hausman

incurred in a series of inconsistencies concerning the bases of his market share opinions. After testifying as to factors which he conceded were not in his Rule 25 report, and which he admitted in his deposition he had not examined, Dr. Hausman pointed to an exhibit to his report (Exhibit 4) as an "econometric study" which took into account those factors. Because the Court initially understood that Dr. Hausman's testimony as to market share had a colorable basis in Exhibit 4, the Court denied Coastal's motion that the testimony be excluded. Upon cross examination, it became apparent that Exhibit 4 was simply an estimate of total demand and had nothing to do with each competitor's share of that total demand nor with the factors which Dr. Hausman had testified were relevant to such an analysis. Dr. Hausman also acknowledged that the only basis for his share opinion set forth in his report, that Coastal had been charging actual lower prices than its competitors, had no support. As such, his direct testimony as to market share, which assumed Coastal's market share absent price discrimination to be the same as its actual market share, simply lacked any basis whatsoever. Thus, his testimony as to Coastal's market share was supported by nothing except his assertion that such would have been Coastal's market share. The Court's role as a "gatekeeper" to screen expert testimony required the exclusion of Dr. Hausman's testimony on market share, and consequently his testimony on Coastal's damages, which depended upon a determination of market share. The Rules of Evidence apply to experts and the Court must make an effort to ensure that expert testimony "is not only relevant, but reliable." *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 589 (1993); *General Electric Co. v. Joiner*, ___ U.S. ___, 118 S.Ct. 512, 517 (1997). As stated in *Joiner*, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." 118 S.Ct. at 519. CAPECO's assertion that Dr. Hausman's market share

testimony was based on "economic oligopoly theory" flies in the face of the trial testimony including his own. Furthermore, Dr. Freyre testified that absent price discrimination economic theory sustains the view that the three competitors would have ended up with comparable shares of the market [if] they were equally efficient. Neither Hausman nor Freyre analyzed the question of efficiency. Dr. Freyre testified that he believed Sherwin's share projections to be erroneous because he believed, based on Hausman's conclusions, that Coastal had actual lower prices. Hausman admitted on cross-examination that his study did not support that conclusion. The Court finds that the exclusion of part of Dr. Hausman's testimony was a proper exercise of the Court's discretion pursuant to Rules 402, 403, 702 and 703 of Evidence. Furthermore, the expert was required to disclose all of the bases and reasons for his opinion in his report. Rule 26 (a) (2) (B), Fed. R. Civ. P. The bases for Dr. Hausman's market share testimony contended by CAPECO in its motion were neither contained in his report nor in his trial testimony. CAPECO has failed to cite any portions of Dr. Hausman's trial testimony in support thereof.

As to CAPECO's contentions as to other evidentiary rulings of the Court, the Court finds that the errors charged did not occur. Dr. Hausman was permitted to testify as to the amount of discrimination involved in Coastal's actual purchases, but not Dr. Freyre because he had not made those calculations.

Dr. Hausman was not permitted to testify as to the reasons for the refusal to deal because that proffered testimony lacked foundation and would have been, in the context of the record speculation as to CAPECO's motivations. CAPECO's reasons for the announcement were stated in CAPECO's own letter. Furthermore, it is apparent from the proffer that the testimony would have been in reference to the Superior Court litigation, contrary to the Court's prior rulings. CAPECO had

the opportunity of presenting competent testimony on the subject from CAPECO officers or employees and did not do so. Absent proper foundation, the expert could not be allowed to speculate that CAPECO would have refused to deal if it had not engaged in price discrimination.

As to plaintiff's Exhibit 311, it was properly admitted because it was directly relevant to the amount of discrimination, and established the degree to which Coastal's competitors obtained competitive advantages as a result of the price discrimination. Mr. Hill's May 1992 affidavit was also properly admitted as it was directly relevant to the issue of Coastal's reasons for closing its operat[ions], and the document was presented during Mr. Hill's testim[ony], who was subject to cross-examination as to the affidavit and his testimony. *See also* Rules 803 (1) and (24) of Evidence.

As to Mr. Sherwin's calculations (Exhibits 327A, 327F, 327H, [__]7, 347B, 347C, 352A and 352B), the same were properly admitted. *See United States v. Winn*, 948 F.2d 145, 157-159 (5th Cir. 1991) and *Terrell v. Household Goods Carrier's Bureau*, 494 F.2d at 24.

IV.

CAPECO claims that the judgment entered is duplicative of the jury's award in the first trial of $500,000 on Coastal's tort claim. CAPECO's contention is not supported by the record. Coastal's expert testified only as to damages resulting from price discrimination and CAPECO presented no evidence that any part of Coastal's damages were occasioned by CAPECO's tortious conduct. Also, the Court of Appeals ruled that CAPECO had waived any such contention and that Coastal could have had a legitimate tort claim which did not overlap

with price discrimination damages. *Coastal Fuels of P.R. Inc. v. Caribbean Petroleum Corp.*, 79 F.3d at 201.

Consequently, there is no basis for the *remittitur* requested by CAPECO.

IT IS SO ORDERED.

San Juan, Puerto Rico, April 23, 1998.

/s/ Juan M. Perez-Gimenez
JUAN M. PEREZ-GIMENEZ
U. S. District Judge

APPENDIX H

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

COASTAL FUELS OF PUERTO RICO, INC.,	*	
Plaintiff	*	
v.	*	Civ. No. 92-1584 (PG)
CARIBBEAN PETROLEUM CORPORATION,	*	
Defendant	*	

JURY INSTRUCTIONS

* * * * *

I therefore instruct you to take as true that defendant CAPECO engaged in illegal price discrimination against the plaintiff Coastal, and that the price discrimination injured Coastal.

So, your only function is now to determine the amount of damages suffered by Coastal as a result of the illegal price discrimination by CAPECO.

In the area of price discrimination there are no automatic damages. Coastal must prove the amount of its damages.

* * * * *

Now, in this case you are being asked to consider damages. With respect to the question of how accurately damages must be measured, Coastal is not required to prove the amount of its damages with any certainty.

At the beginning of the case I mentioned to you preponderance of the evidence. You must put that out of your mind, because in a price discrimination case such as this one, a lesser standard is applied because the most elementary conceptions of justice require that the wrongdoer shall bear the risk of the uncertainty which his own conduct has created.

The law states that a defendant whose wrongful conduct has rendered difficult the determination of the precise damages suffered by the plaintiff is not entitled to complain that they cannot be measured with the same exactness and precision that would otherwise be possible.

So Coastal must produce evidence from which you, the jury, can make a just and reasonable inference as to the amount of damages.

The proof as to the amount of damages may be indirect, and it may include estimates based on assumptions and projections, so long as the assumptions and the projections rest on adequate data.

You may not, however, calculate damages based solely on speculation or guesswork. You may not award damages for injuries or financial losses from other factors other than price discrimination.

Now I will instruct you on the following elements of damages. Plaintiff claims it is entitled to recover any profits it lost as a result of the price discrimination caused by the defendant. Profit in this sense is net profit, and simply means the amount of which plaintiff's gross revenues would have exceeded all of the costs and the expenses that would have been necessary to produce those revenues.

Plaintiff also claims it is entitled to damages for future lost profits as a result of the price discrimination caused by the defendant. If you find that defendant's price discrimination has caused plaintiff to lose profits it could otherwise reasonably expect to earn in the future, you may award plaintiff damages for those future lost profits.

And in computing future profits, the law provides that the plaintiff may recover his lost profits from the date it ceases doing business until a date at or near trial, and in addition, its going-concern value as of that day.

The fact that I have instructed you on the proper measure of damages should not be considered as an indication of any view of mine as to whether you should grant any damages or not. The instructions as to the measure of damages are given to you only for your guidance.

* * * * *

APPENDIX I

COMMONWEALTH OF PUERTO RICO STATUTES

P.R. Laws Ann. tit. 10, § 263. Price discrimination

(a) It shall be unlawful for any person, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where such commodities are sold for use, consumption, or resale in Puerto Rico, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce in Puerto Rico, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

(b) It shall be unlawful for any person to pay or contract for the payment, or contribute to the payment of anything of value to or for the benefit of a customer of such person as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities in Puerto Rico.

(c) It shall be unlawful for any person to furnish, contract to furnish, or contribute to the furnishing of, any services or facilities to or for the benefit of a customer of such person in connection with the processing, handling, sale, or offering for sale of any commodity manufactured, sold, or offered for sale by such person unless such service or facility is available on

proportionally equal terms to all customers competing in the distribution of such commodity in Puerto Rico.

(d) It shall be unlawful for any person to solicit or knowingly to induce or to receive a discrimination in price which is prohibited by the preceding subsection (a), or a payment which is prohibited by subsection (b), or a service or facility which is prohibited by subsection (c).

(e) In any action for violation of subsections (a), (b), (c) or (d) above, it shall be admissible as a defense, proof that the differential granted by the accused person make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. Nothing provided in subsections (a), (b) and (c) shall prevent a seller to interpose as a defense the fact that his lower price or the furnishing of services or facilities to any purchaser was offered to meet an equally low price of a competitor, or the services or facilities furnished by a competitor, if the court affirmatively finds that there has been good faith in the transactions so effected by the seller and the same are not intended to, nor facilitate a violation or evasion of this section.

(f) It shall be unlawful to sell or execute any contract for the sale of goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

June 25, 1964, No. 77, p. 235, § 7, eff. June 25, 1964.

P.R. Laws Ann. tit. 10, § 268. Actions by persons suffering damages

(a) Any person who shall be injured in his business or property by any other person, by reason of acts or intended acts, forbidden or declared to be unlawful by the provisions of this chapter, except sections 259 and 261 of this title, may sue therefor in the Superior Court and shall recover threefold the damages by him sustained, plus costs, including a reasonable amount for attorney's fees.

June 25, 1964, No. 77, p. 235, § 12, eff. June 25, 1964.

APPENDIX J

FEDERAL STATUTES

15 U.S.C. § 13 (a). Price; selection of customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein

contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(Oct. 15, 1914, c. 323, § 2, 38 Stat. 730; June 19, 1936, c. 592, § 1, 49 Stat. 1526.)

15 U.S.C. § 15(a). Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only -

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(Oct. 15, 1914, ch. 323, § 4, 38 Stat. 731; Pub. L. 96-349, § 4(a)(1), Sept. 12, 1980, 94 Stat. 1156; Pub. L. 97-393, Dec. 29, 1982, 96 Stat. 1964.)